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A TREATISE

ON

THE LAW OF EVIDENCE

IN SCOTLAND

BY

WILLIAM GILLESPIE DICKSON
ADVOCATE
PROCUREUR AND ADVOCATE-GENERAL OF THE MAURITIUS.

SECOND EDITION

EDITED BY

JOHN SKELTON, ADVOCATE.

IN TWO VOLUMES.

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TO

THE DEAN AND FACULTY OF ADVOCATES

THIS TREATISE IS INSCRIBED

AS

A TRIBUTE OF SINCERE ESTEEM,

AND

IN ACKNOWLEDGMENT OF

MUCH KIND AND VALUABLE ASSISTANCE

RECEIVED BY THE AUTHOR

FROM

MANY OF HIS BRETHREN OF THE BAR

DURING ITS PREPARATION.

PREFACE TO SECOND EDITION.

The First Edition of this work has been out of print for several years. Mr Dickson's absence from this country, and the pressure of official engagements, prevented him from superintending the issue of a new edition. At his request I undertook the duty of seeing the present edition through the press, and of bringing it into conformity with the existing state of the law.

The alterations on the text are unimportant, and chiefly verbal. The opportunity which I have had of comparing the text with the decisions and the Institutional writers has confirmed my previous impression—an impression which, I believe, is generally entertained by the Profession—that the work is not only substantially, but minutely, accurate. Several important statutes have been passed, and many decisions of great value have been pronounced, since the First Edition appeared. These are mentioned in the Additional Notes,—the Additional Notes being referred to by numerals, the Notes to the First Edition by letters. The leading decisions, more particularly those on points of practice, are fully analysed; and, wherever practicable, the opinions of the Judges are given in their own words.

I have to acknowledge, in a special manner, my obligations to Mr W. E. Gloag, Advocate, from whom I have received most material aid and advice; and without the assurance of whose co-operation I should not have ventured to undertake the revision of a work which embraces so wide a field, and touches on so many departments of our law.

J. S.

Edinburgh, 20 Alva Street,
January 1864.

PREFACE TO FIRST EDITION.

For several years the want of a Treatise on the Modern Rules of Evidence in Scotland has occasioned much inconvenience and difficulty both in the study and the practice of this branch of law. The object of the following pages is to supply the desideratum. With this view the author has endeavoured to collect and analyse all the Scotch authorities upon the subject. He has also borrowed whatever light could be thrown upon it from other systems of jurisprudence, especially those of England and America; and that not merely by examination of the corresponding chapters in the best English treatises, and in the comprehensive and philosophical work of Professor Greenleaf, but also by constant reference to the decisions and other original authorities in English and American law. Care has at the same time been taken to point out any peculiarities in the law of Scotland, which destroy or impair the applicability of illustrations from the systems of other countries.

On points of practice the author has seldom trusted merely to works upon forms and to his own observation, but has consulted gentlemen engaged in both branches of the profession; and he has availed himself of information kindly furnished by Mr Lothian, Procurator-fiscal of Edinburgh, and by several of the Clerks of Court on matters within their departments.

Throughout his labours he has derived much assistance from Mr Tait's work, in which nearly all the authorities on the law of evidence prior to the year 1834 are ably digested. Sir Archibald Alison's volumes on the Criminal Law have also been referred to on all questions relating to that department of the subject. From these sources information has been derived on several matters which have not been treated by any of the institutional writers, or brought before the Supreme Courts for decision.

The author has great pleasure in expressing his hearty thanks to those gentlemen who have favoured him with information and suggestions during his labours. The kindness of many of his brethren of the Bar he has endeavoured to acknowledge in the dedication. But he cannot deny himself the gratification of thanking, in an especial manner, Mr Sheriff Logan for a perusal of a considerable portion of his manuscript work on Cautionary Obligations, which contains a lucid commentary upon the law of evidence applicable to that subject, and upon the doctrine of *rei interventus*. To the unwearied kindness of Mr Patrick Fraser, Advocate, the author is indebted for many valuable suggestions, offered during a revisal of the greater part of the work as it passed through the press. Another of his brethren of the Bar, by

collating nearly the whole references to authorities, has much increased the value of the work, and laid the author under very great obligations.

Notwithstanding the means which have been used for securing copiousness and accuracy, the author is aware that errors must have escaped detection. He would fain hope that they are few, and that they will not prevent the work from being a useful aid in the study and practice of the Law of Evidence.

W. G. D.

EDINBURGH, 7 FETTES ROW,
19th July 1855.

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LIST OF ABBREVIATIONS.

Ad. on Jur. Tr.	Adam on Jury Trial in Scotland, 1836.
Ad. and Ell.	Adolphus and Ellis's Reports, King's Bench. (Eng.)
Al.	Alison's Principles and Practice of the Criminal Law in Scotland, 1832.
Anderson	Anderson's Reports, Common Pleas. (Eng.)
Andrew	Andrew's Reports, King's Bench. (Eng.)
Arkley	Arkley's Reports of Cases in the Court of Justiciary.
A. S.	Acts of Sederunt of the Court of Session.
Atk.	Atkyn's Reports, Chancery. (Eng.)
Bankt.	Bankton's Institute of the Law of Scotland, 1751.
Barn. and Ad.	Barnewall and Adolphus' Reports, King's Bench. (Eng.)
Barn. and Ald.	Barnewall and Alderson's Reports, King's Bench. (Eng.)
Barn. and Cres.	Barnewall and Cresswell's Reports, King's Bench. (Eng.)
Bayley on Bills	5th edition, 1830. (Eng.)
Beavan	Beavan's Reports, Roll's Court. (Eng.)
Beck	Beck's Medical Jurisprudence, 7th ed., 1842.
Bell's Ap. Ca.	Bell's Cases in the House of Lords.
Bell, Com.	Bell's Commentaries on the Law of Scotland, 5th ed., 1826.
Bell, Dic.	Bell's Dictionary of the Law of Scotland, 4th ed., 1838.
Bell, Fo. Ca.	Bell's Folio Cases in the Court of Session.
Bell on Deeds	Bell on the Forms of Deeds in Scotland, 3d ed., 1811.
Bell's Notes	Bell's Notes to Hume on Crimes, 1844.
Bell on Testing Clause	Bell's Lectures on the Solemnities required to Deeds in Scotland, 1795.
Bell, Oct. Ca.	Bell's Octavo Cases in the Court of Session.
Bell's Pr.	Bell's Principles of the Law of Scotland, 4th ed., 1839.
Benth. Jud. Ev.	Bentham's Rationale of Judicial Evidence, 5 vols., 1827.
Best, Pr. of Ev.	Best's Principles of Evidence, 2d ed., 1854. (Eng.)
Best on Pres.	Best on Presumptions, 1844. (Eng.)
Bing.	Bingham's Reports, Common Pleas. (Eng.)
Bishop, Mar. and Div.	Bishop on the Law of Marriage and Divorce. (American.)

Black. Com.	Blackstone's Commentaries. (Eng.)
H. Black.	Henry Blackstone's Reports, Common Pleas. (Eng.)
W. Black.	Sir William Blackstone's Reports, King's Bench and Common Pleas. (Eng.)
Bligh	Bligh's Cases in the House of Lords.
Bos. and Pul.	Bosanquet and Puller's Reports, Common Pleas. (Eng.)
Br. Sup.	Brown's Supplement of Cases in the Court of Session.
Br. Synop.	Brown's Synopsis of Cases in the Court of Session.
Brod. and Bing.	Broderip and Bingham's Reports, Common Pleas. (Eng.)
Broun	Broun's Reports of Cases in the Court of Justiciary.
Brown, C. C.	Brown's Chancery Cases. (Eng.)
Brown, Parl. C.	Brown's Parliamentary Cases. (Eng.)
Buch. Rep.	Buchanan's Reports of Remarkable Cases in Scotland.
Bull. N. P.	Buller's Law of Nisi Prius. (Eng.)
Burge	Burge's Commentaries on Foreign and Colonial Laws, 1838.
Burnett	Burnett's Criminal Law in Scotland, 1811.
Burrow	Burrow's Reports, King's Bench. (Eng.)
Camp.	Campbell's Nisi Prius Reports. (Eng).
Car. and Kir.	Carrington and Kirwan's Nisi Prius Reports. (Eng.)
Car. and Marsh.	Carrington and Marshman's Nisi Prius Reports. (Eng.)
Car. and Pa.	Carrington and Payne's Nisi Prius Reports. (Eng.)
Chitty on Bills	Chitty on Bills of Exchange, 9th ed., 1840. (Eng.)
Chitty, Cr. L.	Chitty's Criminal Law, 2d ed., 1826. (Eng.)
Chitty, R.	Chitty's Reports, King's Bench. (Eng.)
Cl. and Finn.	Clark and Finnelly's Cases in the House of Lords.
Clark	Clark's Cases in House of Lords.
Collyer	Collyer's Chancery Reports. (Eng.)
Cowper	Cowper's Reports, King's Bench. (Eng.)
Cox, Ch. Ca.	Cox's Reports, Chancery. (Eng.)
Cox. Crim. Cases	Cox's Criminal Law Cases. (Eng.)
Cr. and Phil.	Craig and Phillip's Reports, Chancery. (Eng.)
Cr. and St.	Craigie and Stewart's Cases in the House of Lords.
Craig	Craig's *Jus Feudale*, 1732.
Crawf. and Dix.	Crawford and Dix's Irish Circuit Reports.
Cromp. and Jer.	Crompton and Jervis' Reports, Exchequer. (Eng.)
Cromp. and Mee.	Crompton and Meeson's Reports, Exchequer. (Eng.)
Cromp. Mee. and Ros.	Crompton, Meeson and Roscoe's Reports, Exchequer. (Eng.)
Curt.	Curteis' Ecclesiastical Cases. (Eng.)
Dav. and Mer.	Davidson and Merival's Reports, Queen's Bench. (Eng.)
D.	Cases in the Court of Session, from 1838 to 1862, by Dunlop and others.
De. and And.	Deas and Anderson's Cases in the Court of Session.
De Gex, Mac. and G.	De Gex, Macnaughton, and Gordon's Cases in Chancery. (Eng.)
Dennison	Dennison's Crown Cases. (Eng.)
Dickens	Dickens' Reports, Chancery. (Eng.)
Dig.	Digest (Pandects) of Civil Law.
Dirleton	Dirleton's Doubts on the Law of Scotland, 1715.
Dow	Dow's Cases in the House of Lords.
Dow and Cl.	Dow and Clarke's Cases in the House of Lords.
Dow. and Ry.	Dowling and Ryland's Reports, King's Bench. (Eng.)

Dowling	Dowling's Cases in Practice. (Eng.)
Duff. Feud. Con. . . .	Duff's Feudal Conveyancing, 1838.
Durf. and E.	Durford and East's Reports, King's Bench. (Eng.)
East	East's Reports, King's Bench. (Eng.)
Elch.	Elchies' Cases in the Court of Session.
Elch., Notes	Elchies' Notes to his Cases.
El. and Bl.	Ellis and Blackburn's Cases in Queen's Bench and Exchequer. (Eng.)
El. Bl. and El.	Ellis, Blackburn, and Ellis' Queen's Bench Reports. (Eng.)
Eng. Jur.	English Jurist Reports.
Ersk.	Erskine's Institutes of the Law of Scotland, ed. 1842.
Esp.	Espinasse's Nisi Prius Reports. (Eng.)
F. and F.	Foster and Finlayson's Cases at Nisi Prius. (Eng.)
F. C.	Faculty Collection of Cases in Court of Session.
Ferg. Con. Law . . .	Fergusson's Consistorial Law, 1829.
Ferg. Con. Rep. . . .	Fergusson's Consistorial Reports, appended to his Consistorial Law.
Ferg. Rep. in Div. Ca.	Fergusson's Reports in Divorce Cases.
Forsyth on Tr. . . .	Forsyth on the Law of Trusts, 1844.
Fost.	Foster's Crown Law, 3d ed., 1792. (Eng.)
Fount.	Fountainhall's Cases in the Court of Session.
Fraser on Pers. and Dom. Rel. . .	Fraser on the Law of Scotland applicable to Personal and Domestic Relations, 1846.
Gale	Gale's Reports, Exchequer. (Eng.)
Gale and Dav. . . .	Gale and Davidson's Reports, King's Bench. (Eng.)
Gilbert, Eq. R. . . .	Gilbert's Equity Reports. (Eng.)
Glassford	Glassford on Evidence, 1820.
Greenleaf	Greenleaf on Evidence, 1854; vol. i, 7th ed.; vol. ii, 5th ed.; vol. iii, 2d ed. (American.)
H. Black	See *Black*.
Hagg. Con. Rep. . .	Haggart's Consistory Reports. (Eng.)
Hagg. Ec. R.	Haggart's Ecclesiastical Reports. (Eng.)
Hailes	Hailes' Cases in the Court of Session.
Hale	Hale's Pleas of the Crown, 2d ed., 1800. (Eng.)
Har. and Wol. . . .	Harrison and Wollaston's Reports, King's Bench. (Eng.)
Hare	Hare's Reports, Vice-Chancellor Wigram's Court. (Eng.)
Harg., St. Tr. . . .	Hargrave's State Trials.
Holt	Lord Holt's Reports. (Eng.)
Holt, N. Pr.	Holt's Nisi Prius Reports. (Eng.)
How. St. Tr.	Howell's State Trials.
Hunter's Land. and Ten.	Hunter's Law of Landlord and Tenant, 2d ed., 1845.
Hume	Hume's Commentaries on the Criminal Law of Scotland, 3d ed., 1829.
Hume D.	Hume's Decisions in the Court of Session.
Hurl. and Gord. . . .	Hurlstone and Gordon's Exchequer Reports. (Eng.)
Irv.	Irvine's Cases in the Court of Justiciary.
Ivory's Ersk.	Erskine's Institutes of the Law of Scotland, Mr Ivory's edition, 1824.

Jac. and Walk. . . .	Jacob and Walker's Reports, Chancery. (Eng.)
Jacob	Jacob's Reports, Chancery. (Eng.)
J. Shaw	See *Shaw*.
Jur.	Scottish Jurist.
Jur. N. S.	New Series of English Jurist Reports.
Kames' Law Tr. . .	Kames' Law Tracts, 4th ed., 1792.
Keble	Keble's Reports, King's Bench. (Eng.)
Keen	Keen's Reports, Chancery. (Eng.)
Kent	Kent's Commentaries 1840. (American.)
L. J.	Law Journal Series of Reports. (Eng.)
L. T.	Law Times Series of Reports. (Eng.)
Lea, Ca. Temp. Hardw.	Lea's Cases in time of Lord Hardwick. (Eng.)
Lea, C. C.	Leach's Crown Cases. (Eng.)
Levinz	Levinz's Reports. (Eng.)
Lewin, C. C.	Lewin's Crown Cases. (Eng.)
Loftt	Loftt's Reports, King's Bench. (Eng.)
M.	Morrison's Dictionary of Decisions in the Court of Session.
Ma. and Sel.	Maule and Selwyn's Reports, King's Bench. (Eng.)
Mack. Cr.	Mackenzie on the Criminal Law of Scotland, 1716.
Mack. Inst.	Mackenzie's Institutes of the Law of Scotland, 1716.
Macf. Pr.	Macfarlane's Practice of the Court of Session in Jury Causes 1837.
Macf. R.	Macfarlane's Reports of Jury Causes.
Maclau.	Maclaurin's Cases in the Court of Justiciary.
Macph.	Cases in Court of Session from 1862, by Macpherson and others.
Macq.	Macqueen's Cases in the House of Lords.
Man. and Gr. . . .	Manning and Granger's Reports, Common Pleas. (Eng.)
Man. Gr. and Scott .	Manning, Granger, and Scott's Reports, Common Pleas. (Eng.)
Man. and Ry. . . .	Manning and Ryland's Reports, King's Bench. (Eng.)
Marsh.	Marshall's Reports, Common Pleas. (Eng.)
M'L. and Rob. . . .	Maclean and Robinson's Cases in the House of Lords.
Mee. and Wel. . . .	Meeson and Welsby's Reports, Exchequer. (Eng.)
Meriv.	Merivale's Reports, Chancery. (Eng.)
Mod.	Modern Reports. (Eng.)
Moo. Cr. Ca.	Moore's Crown Cases. (Eng.)
Moo. Pr. C. C. . . .	Moore's Privy Council Cases. (Eng.)
Moo. and Mal. . . .	Moody and Malkin's Nisi Prius Reports. (Eng.)
Moo. and Pa.	Moore and Payne's Reports, Common Pleas. (Eng.)
Moo. and Rob. . . .	Moore and Robinson's Nisi Prius Reports. (Eng.)
Moo. and Sc.	Moore and Scott's Reports, Common Pleas. (Eng.)
More	More's Notes to Stair's Institutes of the Law of Scotland.
Mur.	Murray's Reports of Cases in the Jury Court.
Myl. and Cr.	Mylne and Craig's Reports, Chancery. (Eng.)
Myl. and Kee. . . .	Mylne and Keen's Reports, Chancery. (Eng.)
Napier on Prescr. . .	Napier on the Law of Prescription in Scotland, 1854.
Nev. and Man. . . .	Nevile and Manning's Reports, King's Bench. (Eng.)
Nev. and Per. . . .	Nevile and Perry's Reports, Queen's Bench. (Eng.)

Paton's Ap. Ca.	Paton's Cases in the House of Lords.
Pea. Ev.	Peake on Evidence, 5th ed., 1822. (Eng.)
Pea. R.	Peake's Nisi Prius Reports.
Per. and Dav.	Perry and Davidson's Reports, Queen's Bench.
Phill.	Phillips on Evidence, 9th ed., 1848. (Eng.)
Phill. Ec. R.	Phillimore's Ecclesiastical Reports. (Eng.)
Pitc. Tr.	Pitcairn's Criminal Trials in Scotland.
Pollex.	Pollexfen's Reports. (Eng.)
Price	Price's Reports, Exchequer. (Eng.)
P. Williams	See *Williams*.
Reg. Maj.	Regiam Majestatem.
Rob. Adm.	Robinson's Admiralty Reports. (Eng.)
Rob. Ap. Ca.	Robertson's Cases in the House of Lords.
Rob. Ap. Ca., vol. i or ii	Robinson's Cases in the House of Lords.
Rob. Eccl. Rep.	Robertson's Ecclesiastical Reports. (Eng.)
Rolles' Abr.	Rolles' Abridgment. (Eng.)
Rosc. Cr. Ev.	Roscoe's Evidence in Criminal Cases, 3d ed., 1846. (Eng.)
Rosc. Ni. Pr.	Roscoe's Evidence at Nisi Prius, 8th ed., 1851. (Eng.)
Ross Lea. Ca.	Ross' Leading Cases on the Law of Scotland.
Ross Lec.	Ross' Lectures on Conveyancing, 1822.
Russ.	Russell's Reports, Chancery. (Eng.)
Russ. Cr.	Russell on Crimes, 3d ed., 1843. (Eng.)
Russ. and My.	Russell and Mylne's Reports, Chancery. (Eng.)
Russ. and Ry.	Russell and Ryan's Crown Cases. (Eng.)
Ry. and Moo.	Ryan and Moody's Nisi Prius Reports. (Eng.)
S.	Cases in Court of Session from 1821 to 1838, by Shaw and Dunlop and Others.
S. C.	Same Case.
Salk.	Salkfield's Reports. (Eng.)
Saund.	Saunder's Reports. (Eng.)
Sch. and Lef.	Schoales and Lefroy's Chancery Reports. (Ireland.)
Sc. Jur.	Scottish Jurist Series of Reports.
Scott	Scott's Reports, Common Pleas. (Eng.)
Scott N. R.	Scott's New Reports, Common Pleas. (Eng.
Sel. N. P.	Selwyn's Law of Nisi Prius, 11th ed., 1845. (Eng.)
Sh. Ap.	Shaw's Cases in the House of Lords.
Sh. Dig.	Shaw's Digest of Decisions in the Supreme Courts of Scotland.
Sh. and M'L.	Shaw and Maclean's Cases in the House of Lords.
Sh. Just. Ca.	P. Shaw's Cases in the Court of Justiciary.
Shand's Pr.	Shand's Practice of the Court of Session, 1848.
J. Shaw	John Shaw's Cases in the Court of Justiciary.
Siderf.	Siderfin's Reports. (Eng.)
Sim.	Simon's Reports, Vice-Chancellor's Court. (Eng.)
Sim. and Stu.	Simons and Stuart's Reports, Vice-Chancellor's Court. (Eng.)
Skin.	Skinner's Reports, King's Bench. (Eng.)
Smaile and Giff. Chan.	Smaile and Gifford's Reports in Chancery. (Eng.)
Smith's Lea. Ca. . . .	Smith's Leading Cases. (Eng.)
St. Tr.	State Trials, reported by Cobbett and Howell.
Stair	Stair's Institutes of the Law of Scotland.

Stark. Ev.	Starkie on Evidence, 3d ed., 1842. (Eng.)
Stark. R.	Starkie's Reports. (Eng.)
Stew. Answ.	Stewart's Answers to Dirleton's Doubts on the Law of Scotland.
Story, Confl.	Story's Conflict of Laws, 2d ed., 1841.
Strange	Strange's Reports. (Eng.)
Swab. and Trist. . .	Swabey and Tristram's Probate and Divorce Cases.
Swanst.	Swanston's Reports, Chancery. (Eng.)
Swin.	Swinton's Cases in the Court of Justiciary.
Sym.	Syme's Cases in the Court of Justiciary.
Tait Ev.	Tait's Law of Evidence, 3d ed., 1834.
Taunt.	Taunton's Reports, Common Pleas. (Eng.)
Taylor	Taylor on Evidence, 1848. (Eng.)
Temp. and Mew. . .	Temple and Mew's Criminal Cases. (Eng.)
Thomson on Bills . .	2d ed., 1836.
Toml. L. Dic. . . .	Tomlin's Law Dictionary.
Turn. and Russ. . .	Turner and Russell's Reports, Chancery. (Eng.)
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Tyrw. and Gr. . . .	Tyrwhitt and Granger's Reports, Exchequer. (Eng.)
Vaugh.	Vaughan's Reports, Common Pleas. (Eng.)
Ventr.	Ventris' Reports, King's Bench and Common Pleas. (Eng.)
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Ves. and Bea. . . .	Vesey and Beame's Reports, Chancery. (Eng.)
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Wils. Exch.	Wilson's Exchequer Reports. (Eng.)
P. Williams	Pere William's Reports, mostly in Chancery. (Eng.)
Younge	Younge's Exchequer Reports. (Eng.)
You. and Coll. Ch. R. .	Younge and Collyer's Reports, Vice-Chancellor's Court. (Eng.
You. and Coll. Ex. R.	Younge and Collyer's Exchequer Reports. (Eng.)
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" v. Nicolson, 728.
" v. Patton, 923.
" v. Pollock, 261, 264, 266.
" v. Sheridan, 252.
" v. Simpson, 394.
" v. Ritchie, 442, 444, 497, 553.
" v. Thomson, 705.
" v. Watt, 832.
" v. Wauchope's Heirs, 568.
" v. Wright, 823, 874.
" v. Young, 933.
" & Co. v. Commissioners of Excise, 1068, 1069.
" " v. Dewar, 143.
" " v. Muir, 856, 869.
" " v. Playfair, 931.
" Ross, Richardson, & Co. v. Muir, 815.
Young's Children v. Anderson, 436.
" Trs. v. Paisley Bank and Scott, 489, 540.
Younger v. Pollock, 917, 949, 950.
Yule v. Robertson, 926.

Zincean v. Kinlock, 726.

A TREATISE

ON

THE LAW OF EVIDENCE

IN SCOTLAND.

Every cause which comes before a court of justice embraces two questions, namely, first, what are its facts; and, second, what is the law applicable to those facts. The first of these questions is determined by evidence, which is of various kinds, according to the nature of the facts to be ascertained and the means available for investigating them. In all systems of jurisprudence there are rules for determining the admissibility and value of the different kinds of evidence, and the modes in which they may be adduced; the main object of such rules being, to exclude valueless and deceptive proofs, to secure regularity in the investigations, and to confine within reasonable limits the duration and expense of judicial proceedings.

Most countries also recognise forms for the effectual constitution, transmission, and extinction of certain rights and obligations; while some transactions are not completed until they have been entered in an appropriate register, in order that their existence may be known to all persons interested in them.

The Law of Evidence comprehends the rules as to judicial in vestigation into matters of fact, and the general principles regard ing formal writings and registers; the technical details of whicl fall within the province of the Conveyancer.

In the following pages the Law of Evidence in Scotland will b considered in two parts; the first of which will embrace the gene ral rules applicable to all kinds of evidence; and the second wil deal with the more detailed rules regarding the different items o which the proof in a cause may be composed, or—as they are usu ally termed—the different instruments of evidence.

PART FIRST.

GENERAL RULES APPLICABLE TO ALL KINDS OF EVIDENCE.

PART FIRST.

GENERAL RULES APPLICABLE TO ALL KINDS OF EVIDENCE.

TITLE I.

OF THE BURDEN OF PROOF.

§ 1. In every case of disputed fact the first question to be determined is,—upon whom does the burden of proof lie? On this depends the effect of either party failing to prove his averments, as well as the point, sometimes an important one, which party is to open (*a*).

§ 2. The fundamental principle regarding the burden of proof is, that it rests with the party who would fail if no evidence were adduced on either side (*b*). Accordingly, it always lies on the pursuer in the first instance; because he is *in petitorio*, and no one by merely raising an action can require his antagonist to disprove his allegations; and because *in pari casu melior est conditio possidentis* (*c*).

(*a*) In civil jury trials in England, the question of the onus often arises at the trial in a discussion upon this latter point; Taylor, 270; but in Scotland, the Court at an earlier stage of the case, fix which party is to stand pursuer of the issue; Macf. Pr., 99, 100. In criminal prosecutions in both countries, questions of the *onus probandi* are evolved during the trial, as it always falls on the prosecutor to begin, while there is sometimes a difficulty in determining how far he must go in his proof before being entitled to a verdict. (*b*) 1 Starkie Ev., 418—Taylor, 261. (*c*) Mitchell v. Rankine, 1832, 10 S., 716.

§ 3. Where there are mutual conjoined actions the question which party must take the onus, depends upon the presumptions arising in the circumstances. If a defender has been obliged to raise an incidental process,—as of declarator, reduction, or proving of the tenor, he must prove the facts thereby put in issue; because the very ground on which he has to raise such an action is, that the burden of proof lies upon him (*d*). When, however, the second action is not necessary for the plea of the defender in the first, his raising it will not transfer the burden. Thus, where an heir raised a reduction of his ancestor's settlement upon the head of deathbed, and the trustees under it brought a declarator of liege poustie, and the actions were conjoined, the heir was made pursuer of the issue (*e*). In conjoined actions of implement and reduction of a decree-arbitral, the pursuer of the reduction (which came first into Court), was allowed to stand pursuer of the issue (*f*).[1] In competing claims for a succession, so long as neither party has been served heir, the burden of proof ought not to be laid on one rather than on the other, as both are *in petitorio*, and are generally on an equal footing as to legal presumption. Accordingly, the recent Act regarding services directs the Sheriff in cases of competing petitions of service to conjoin the petitions, and take evidence, "allowing to each of the parties, not only a proof in chief with reference to his own claim, but a conjunct probation with reference to the claim of the other parties" (*g*). When the conjoined petitions are advocated, and a trial by jury directed (*h*), there will be a difficulty as to which party is to stand pursuer of the issue. In one case of this kind where a party claiming to be heir was opposed by three competitors, claiming to be connected with the deceased in a more remote degree, and all denying his relationship, the Court, in an advocation of the conjoined petitions of service, appointed him to stand pursuer of the

(*d*) Thus when the defender in a possessory action to have an erection removed brings a declarator of his right to put it up, he stands pursuer of the issue; Brand *v.* Charteris, 1842, 4 D., 345. (*e*) Macdougalls *v.* Gordon, 1831, 9 S., 392. The deed being valid *ex facie*, was good till reduced. The question here was, which party *was entitled* to stand pursuer. (*f*) M'Phersons *v.* Ross, 1831, 9 S., 797.[1] (*g*) 10 and 11 Vict., c. 47, § 11. (*h*) Ibid., § 17.

[1] Here, as in the case of Macdougalls, the question was, who was entitled to stand pursuer, and *so to have the right of reply*, to which the pursuer of an issue, at the date of these decisions, was entitled. But as, according to present practice, the defender has the right to speak last, the question who is *entitled* to stand pursuer does not now occur; 13 and 14 Vict., c. 36, § 44.

issue in the first trial, as against all the other competitors. The verdict was against him; and the case is now in Court with regard to farther procedure (*i*).[2] In competitions of heirs, however, when one claimant has been served, and another raises a reduction of his service, the question arises upon the title of the latter to reduce; the retour or decree of service presumes propinquity, and the new claimant must stand pursuer of the issue, whether he is nearest heir to the deceased (*k*). But it would seem that this is not the rule in reductions at the instance of the Crown as *ultimus haeres* (*l*). In one case where each of two claimants served himself heir, and brought a reduction of the other's service, each had to stand pursuer of an issue of his own propinquity (*m*). But there were specialities in this case. In such competitions the onus frequently shifts in the course of the trial, as it is the form of the action, and not presumptions from the facts of the case, which fixes the burden in the first instance (*n*).[3]

Where the question of a right of public road was raised by the proprietors of the ground bringing an action of declarator that there was no public road in the direction, the Court required the

(*i*) Morris *v.* Morgan, 13th Nov. 1853. The case has been appealed.[2] (*k*) Willox *v.* Farrell, 1846, 8 D., 1226—M'Lean *v.* M'Lean, 1849, 11 D., 880—Douglas *v.* Hamilton, 1769, 2 Pat., 143. (*l*) M'Lean *v.* Off. of State, 1846, 5 Bell's App. Ca., 60. (*m*) Watson *v.* Watson, 1834, 7 W and S., 535; and 1836, 14 S., 734.
(*n*) See *below*, § 12.

[2] The competition in this case occurred in a multiplepoinding brought by the judicial factor on the estates in question, and not, as stated in the text, in an advocation of conjoined petitions. The verdict, which the Court applied on the motion of the defenders, was that the case of the pursuers was not proven. In the appeal (besides the argument on the terms and form of the verdict) it was contended (1) that the judicial factor, as representing the estate, was the proper contradictor of the issue, and that as he had not been made a defender of the issue, there had been no proper contradictor; (2) that the cases of all the claimants should have been sent to trial at once before the same jury, and that the appellants should not have been made to stand pursuers against all the other claimants. But the House of Lords approved of the procedure adopted for the trial, and held that those claiming beneficial interest on the estate were the proper defenders of the issue, and that no greater obligation had been imposed on the appellants than every one in similar circumstances had necessarily to undertake. The House, however, thought that the verdict was uncertain, and they remitted the cause; Morgan *v.* Morris, 1855, 2 Macqueen, 342.

[3] Where the defender, in a reduction of his confirmation as executor-dative *qua* nearest of kin, denied the pursuer's legitimacy, and the pursuer did not aver that his father and mother had been regularly married, but stated that they were habit and repute married persons, the Court refused the pursuer an issue, but, with consent of the defender, allowed him a proof of his legitimacy, reserving the question whether he was a competent witness; Swinton *v.* Swinton, 1862, 24 D., 833.

defender in the action to stand pursuer of the issue, on the ground that he was the real claimant, and that the proprietors were really on the defensive (*o*). It was observed on the bench that there is no general rule as to the burden of proof in such cases, but that the decision then pronounced would rule the greater proportion of them in future.

§ 4. It is only when the defences contain a simple denial of the pursuer's averments, that the onus falls as a matter of course upon him. In the more common case of the defence being laid upon explanations or counter averments, which in their nature admit of proof, the question which party must take the lead is determined by more discriminating rules (*p*).

The leading rule is one "which natural reason and common sense dictate," namely, that the party alleging the affirmative must prove it (*q*). And the operation of this rule is not determined by the mere form, but by the substance and effect of the averment, which can generally be stated either affirmatively or negatively by a slight change of expression (*r*).

This leading rule, however, is subject to several exceptions.

§ 5. Where the legal presumption is in favour of one party's plea, the party maintaining the opposite must prove it, although involving a negative (*s*). Thus one who alleges that a person is not sane must prove it, the presumption being in favour of sanity (*t*).[4] Thus also, as there is a strong presumption against documents vitiated in essential parts, it falls on those claiming under such deeds

(*o*) Barings *v.* M'Queen, 1853, 15 D., 455. In some previous cases where the point was not raised, the proprietor stood pursuer of the issue; Forbes *v.* Morrison, 1851, 13 D., 1404. (*p*) For example, where a landlord brought an ejectment against a party claiming to sit by sublease from the landlord's tenant, and the landlord denied that the principal tenant's lease gave power to subset, it was held that the existence of the power must be proved by the tenant; and, the lease having been lost, the subtenant was ejected; E. Glasgow *v.* Hamilton, 1851, 13 D., 1290. (*q*) 1 Starkie, 418—(The quotation in the text is from this work)—1 Phil., 493—Taylor, 261—1 Greenleaf, 98—Downes *v.* Cassels, 1829, 2 De. and And., 184—Aitken *v.* Charles & Co., 1830, 8 S., 446, per Lord Justice-Clerk Boyle—Bishop *v.* Mersey and Clyde Nav. Co., 1830, 2 De. and And., 295—Rathbone *v.* Glenny, 1833, 11 S., 574—Brand *v.* Charteris, 1842, 4 D., 345—Ramsay *v.* M'Lellan, 1845, 8 D., 142—Johnston *v.* Macdonald, 1834, 12 S., 568—Waddell's Trus. *v.* Scot, 1833, 11 S., 655. (*r*) Soward *v.* Leggett, 1836, 7 C. and P., 613; per Lord Abinger, 1 Starkie Ev., 418. (*s*) 1 Starkie Ev., 422—1 Phil., 495—Taylor, 263. (*t*) Towart *v.* Sellars, 1815, 5 Dow, 231—Bell's Prin., 2103.[4]

[4] Sutton *v.* Sadler, 1857; 3 Scott's N. R., 87.

to prove that the alterations were made innocently (*u*). The legal presumption in favour of life requires the party averring death to prove it, or circumstances sufficient to overcome the presumption (*w*).[5] In an action for infringement of a patent, the existence of the patent is *prima facie* evidence of its originality, so as to throw the onus of proving the opposite on the defender (*x*).[6] A party granting an acknowledgment in such terms as, "Received from A B the sum of £12," and alleging that it was not granted with the view of creating an obligation to repay, but for some other purpose, *e.g.*, as a receipt for money paid him on behalf of a joint adventure, must prove his averment (*y*).[7] But where the acknowledgment is in a bill on which prescription has run, the burden of proof is reversed (*z*). Where bills were challenged as having been obtained from a party without value and on false representations, and where the holders alleged that they received them from him as donations, the Court required the challenger to stand pursuer of the issue, although he pleaded that the presumption against donations threw the *onus probandi* on the holders of the bills (*a*).

§ 6. Where a presumption in favour of an averment arises from the course of trade or business, the opposite must be proved,

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(*u*) Whitehead *v.* Armstrong, 1836, 14 S., 544—Armstrong *v.* Wilson, 1842, 4 D., 1347—Miller *v.* Robertson, 1835, 13 S., 813—M'Lean *v.* Morrison, 1834, 12 S., 613.

(*w*) Tait, 478, and cases there cited—Wilson *v.* Hodges, 1802, 2 East., 312.

(*x*) Russell *v.* Crichton, 1838, 16 S., 1155. (*y*) Martin *v.* Crawford, 1850, 12 D., 960—Allan *v.* Murray, 1837, 15 S., 1130.7 (*z*) See the chapter on Sexennial Prescription. (*a*) Wilkie *v.* Chalmers, 1854, 16 D., 961.

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[5] There being a presumption that a man's domicile of origin continues his domicile, the onus lies on the party who alleges a different domicile; Aikman *v.* Aikman, 1861, 3 Macqueen, 854; *per* Lord Wensleydale, 877.

[6] A certificate of registry was held such *prima facie* evidence of title to a ship, that those holding it obtained unconditional recal of arrestments used by creditors of the former owners, though the arresters averred that the transference was fraudulent and collusive; Duffus & Lawson *v.* Mackay, 1857, 19 D., 430.

[7] Fraser *v.* Bruce, 1857, 20 D., 115. In Thomson *v.* Geekie, 1861, 23 D., 693, Geekie raised an action for £30, founding on a document in the following terms:—"Received from G the sum of £30 sterling, *as per agreement.*" The document was holograph of and signed by the defender. The majority of the Court held that the words "as per agreement" did not affect the *onus probandi*, and that it was to be presumed that the money had been advanced in loan, and not as a consideration for certain services, as alleged by the defender. But the Lord Justice-Clerk Inglis (differing from the rest of the Court) thought the document disclosed an apparent ambiguity, that the party founding on it ought to show that the agreement referred to was consistent with his claim; and, therefore, that the onus was in the first instance on the pursuer.

although a negative (*b*). Thus in actions upon contracts inferring warrandice, *e.g.*, a contract for the sale of a horse, it does not lie with the pursuer to prove a special warrandice, but with the defender to prove that there was none (*c*).[8] And under an issue of partnership it is presumed, until the contrary is proved, that the contract was to carry on business as open and avowed partners (*d*).[9] Thus also, where there had been a regular course of business between the pursuer and defender, under which the latter received money from the former and accounted for it statedly, the burden of proving that he did not account in any individual instances falls on the pursuer (*e*).[10] On the same principle, where there is proof of the regular practice of a house of business to dispatch its letters in a particular manner to the post-office, it is not necessary to prove that the individual letter in question was so despatched (*f*); and proof that a letter was put into the post-office seems to lay the onus of proving non-delivery on the party averring that fact (*g*).[11]

(*b*) Stewart *v.* Gordon, 1831, 9 S., 466. (*c*) M'Bey *v.* Reid, 1842, 4 D., 349.

(*d*) Fraser *v* Hair, 1848, 10 D., 1402. (*e*) Tait, 466, and cases ib. cit.—Evans *v.* Birch, 1811, 3 Camp., 10—See Gye and Co. *v.* Hallam, 1834, 12 S., 311.

(*f*) Sandeman *v.* Thomson, 1831, 10 S., 4—Robertson *v.* Gamach, 1835, 14 S., 139—Stock *v.* Aitken, 1846, 9 D., 75—Galbreath *v.* Warden, 1820, Hume D., 79.

(*g*) Stewart *v.* Wright, 1821, 1 S., 213, and cases in preceding note.[11]

[8] Section 5 of the Mercantile Amendment Act provides,—" Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective, or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."—19 and 20 Vict., c. 60. The term " goods " in the Mercantile Amendment Act, comprehends horses (Young *v.* Giffen, 1858, 21 D., 87—Sim *v.* Grant, 1862, 24 D., 1033); and, therefore, the purchaser of a horse suing for recovery of the price, on the ground that the horse was unsound, was required to put in issue whether the defender gave an express warranty that the horse was sound; Young *v.* Giffen, *ut supra.*

[9] A pursuer, who wished to prove a partnership, and that each partner had equal shares, was obliged to take an issue whether the parties carried on business as copartners with equal shares, although he argued that there was a presumption for equality; Aberdeen Town and County Bank *v.* Clark, 1859, 22 D., 44.

[10] When accounts have been balanced, and docqueted as correct, for a series of years, the onus of proving error lies on the party disputing them; Maclaren or Law *v.* Wilson, 1862, 24 D., 577—Laing *v.* Laing, 1862, 24 D., 1362.

[11] Mackenzie *v.* Dott, 1861, 23 D., 1310. The service of various statutory notices is sufficiently proved by proof that they were put in the post-office duly addressed in such time as to admit of delivery in the ordinary course within the period prescribed by

§ 7. In general, also, the negative must be proved when it involves a criminal omission, and there is consequently the presumption of innocence against it (*h*). Accordingly, in an action in England for putting combustibles on board the plaintiff's ship without notice of their nature, in consequence of which the ship was burnt, the plaintiff had to prove the want of notice (*i*); and in a prosecution for cutting trees without consent of the proprietor, who had given directions for conducting the prosecution, but had died before the trial, his non-consent to the cutting had to be proved (*k*).[12] The same principle is often illustrated in prosecutions laid upon neglect of duty. But in cases of concealment of pregnancy, the prosecutor has only to prove the pregnancy, and the negative fact of the panel not having revealed her condition to any one will rest on the averment to that effect in the libel until it be disproved (*l*). This arises from the impossibility of the prosecutor proving concealment from every person, and the facility with which the panel can show that she revealed her state to some person, if that be the fact. It comes under the rule as to a fact falling peculiarly within the party's own knowledge (*m*).

The negative must also be proved where it is an averment of fraud (*n*), or of omission or irregularity, which, although not criminal, is culpable (*o*). On this ground, in an action on a policy of sea insurance, the defence that the vessel was not fully equipped, although a negative, must be proved (*p*); and the same holds as to an averment of concealing material facts in a contract of insurance (*q*). On the same principle, where an extract decree *ex facie* regular, but which did not bear the date of extracting (that not being necessary), was charged on, and the charge was suspended on the ground that there was no proof of the six days having elapsed

(*h*) 1 Starkie Ev., 421—1 Greenleaf, 106. (*i*) Williams *v.* E. Ind. Co., 1802, 3 East., 192. (*k*) R. *v.* Hazy, 1826, 2 C. and P., 458[12]—see also R. *v.* Rogers, 1811, 2 Camp., 654. (*l*) 1 Hume, 294—1 Al., 155. (*m*) *Infra*, §§ 9 and 10. (*n*) Campbell *v.* Aberdeen Ins. Co., 1841, 3 D., 1010. (*o*) 1 Phil., 498—Taylor, 263—1 Greenleaf, 106. (*p*) Harvie *v.* Smith, 1818, 1 Mur., 302. (*q*) Elkin *v.* Jansen, 1845, 13 M. and W., 655—Campbell *v.* Aberdeen Ins. Co., 1841, 3 D., 1010—See another illustration of the principle noticed in the text in Condie *v.* M'Donald, 1834, 13 S., 61.

the particular Act—see 19 and 20 Vict., c. 58, § 9 (Registration of Voters); 19 and 20 Vict., c. 103, § 50 (Nuisance Removal); 20 and 21 Vict., c. 73, § 10 (Smoke Nuisances Amendment); 25 and 26 Vict., c. 89, §§ 62, 63 (Companies Act, 1862).

[12] The prosecution was for the statutory offence of cutting trees "without the consent of the owner;" 6 Geo. III, c. 36.

before the extract was made, it was held that the suspender must prove that the extract was issued prematurely (*r*). So a party alleging that an arbiter decided without hearing parties, stands pursuer of the issue (*s*).

§ 8. A party who maintains against another a forfeiture on the ground of non-implement of a condition of the possession, must prove the non-implement; because the other party may maintain his possession till ground be shewn for disturbing it. On this principle it was held in England that a landlord attempting to eject his tenant on the ground of failure to insure against fire, must prove the failure, and that he will not be relieved from doing so by the neglect of the tenant to produce the policy, the only effect of its absence being to let in secondary proof of it (*t*). In the same manner the party averring deficiency in value must prove it, as in the case of land assigned in payment of a legacy (*u*). The burden of proving the fairness of a transaction with an expectant heir for burdening or selling his expectancy, is held in England to lie on the party dealing with him (*w*). This, although apparently an exception to the general rule, is really an illustration of it, because there is in England a presumption against such contracts being fair. Accordingly in Scotland, where there is no such presumption, the heir challenging the transaction has to prove that it was unfair or fraudulent (*x*).

§ 9. Another exception to the general rule is, that a party must prove his averment either affirmative or negative of a fact peculiarly within his knowledge (*y*). Thus one who pleads his nonage at a particular date must prove it (*z*). Thus also when the subject of a contract of hiring was sound when borrowed, but was unsound when returned, the borrower has to prove that he bestowed proper care upon it (*a*).[13] It is partly on this ground that when goods

(*r*) Grindlay *v.* Saunders, 1830, 8 S., 642. (*s*) M'Pherson *v.* Ross, 1831, 9 S., 797. (*t*) Taylor, 268—Doe *v.* Whitehead, 1838, 8 A. and E., 571. (*u*) 1 Starkie, 420—Berty *v.* Dormer, 1701, 12 Mod. R., 526. (*w*) Bernal *v.* M'Dougal, 1814, 3 Dow, 151, and cases cited by defender in M'Kirdy *v.* Anstruther, 1839, 1 D., 855. (*x*) M'Kirdy *v.* Anstruther, 1839, *supra.* (*y*) 1 Starkie Ev., 420—1 Phil., 495—Taylor, 269—1 Greenl., 105—Philip *v.* Gordon, 1848, 11 D., 179, per Lord Jeffrey—R. *v.* Burdett, 1820, 4 B. and Ald., 140, per Holroyd—Dickson *v.* Evans, 1794, 6 T. R., 57, per Ashurst. See also *infra*, § 16 *ad finem.* (*z*) Borthwick *v.* Carruthers, 1787, 1 Term R., 648. (*a*) Robertson *v.* Ogle, 23d June 1809, F.C.—Binney *v.* Veaux, 1679, M., 10,079—Pyper *v.* Thomson, 1843, 5 D., 498—Marquis *v.* Ritchie, 1823, 2 S., 386.

[13] A horse died in the hands of an intending purchaser who had him on trial; and the Court, holding that the intending purchaser had not proved that the death of the

ve been put on board a carrying vessel in a sound condition, but ve been delivered damaged, the shipper must prove such a *casus rtuitus* as will exonerate him (*b*).[14] And if the vessel has been anded, it is not enough for him to prove generally that the crew ere careful in landing the cargo, but the loss at sea of the partiular goods must be made out (*c*).

§ 10. The exception last noticed holds even against the accused n criminal cases, notwithstanding the presumption of innocence. n example of this occurs in cases of concealment of pregnancy, here it lies on the prisoner to prove that she revealed her condition o some person (*d*). So, in a prosecution for having game in one's ossession without a qualification, it was held in England that the ccused must prove his qualification (*e*); and the same rule was pplied in an action in England for the penalties for practising as an pothecary without a license (*f*). This principle will be applied in ll prosecutions, civil or criminal, for doing what no one is permitted o do without a special qualification (*g*). The same principle has een adopted by the legislature in the Acts for protecting the coinage (*h*),[15] and for preventing forgeries of bank notes (*i*), and frauds upon the revenue by erasing or altering stamps on paper or vellum (*k*); all which statutes lay on the panel the burden of proving a lawful excuse for his possession of the coining utensils, forged notes, or altered stamps, as the case may be.[16]

(*b*) Jones *v.* Ross, 1830, 8 S., 495. This also arises from the peculiar rules of the edict *nautae caupones*, &c. (*c*) Rae *v.* Hay, 1832, 10 S., 303. (*d*) 1 Hume, 294—1 Al., 155. (*e*) R. *v.* Turner, 1816, 5 Ma. and Sel., 206. (*f*) Apoth. Co. *v.* Bentley, 1824, Ry. and Mo., 159. (*g*) 1 Phil., 496—1 Greenl., 105—Taylor, 270. (*h*) 2 Will. IV, c. 34, § 10.[15] (*i*) 45 Geo. III, c. 89, § 6. (*k*) 3 and 4 Will. IV, c. 97.

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home was not caused by his fault, held that he should pay the owner its value; Pullars *v.* Walker, 1858, 20 D., 1238.

[14] It is provided by § 17 of the Mercantile Amendment Act—"That from and after the passing of this Act, all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers."—19 and 20 Vict., c. 60. When goods are damaged or lost on board ship without "the actual fault or privity" of the owners, the owners are not liable for "an aggregate amount exceeding eight pounds for each ton of the ship's tonnage," as defined in the Act 25 and 26 Vict., c. 63, § 54 (Merchant Shipping Acts Amendment Act, 1862).

[15] The Act 2 Will. IV, c. 34, is repealed by 24 and 25 Vict., c. 95. But there are various provisions to the effect stated in the text in the Coinage Offences Act, 24 and 25 Vict., c. 99. See §§ 6, 7, 8, 23, 24, 25.

[16] So in proceedings under the Passengers Amendment Act, a party pleading that a

The reason for the exception in these cases is the extreme difficulty, sometimes amounting to impossibility, of proving the opposite averment; whereas the party within whose knowledge the fact must lie, if it exist, can have comparatively little difficulty in proving it (*l*).

§ 11. The English authorities recognise another exception to the rule that the affirmative must be proved, namely, where the negative averment is essential to the case of the party making it (*m*). No Scotch decision has been found which expressly settles this principle; but it seems to be supported by the rules, that the party averring want of probable cause must prove it (*n*); and that an heir reducing a service by his ancestor's widow to her terce, must prove that a living child was not born of the marriage, even where the widow admits that the marriage was dissolved within year and day (*o*).

(*l*) See 1 Greenl., 105. (*m*) 1 Starkie Ev., 623—Taylor, 263—Williams *v.* E. India Co., 1802, 3 East., 192—R. *v.* Rogers, 1811, 2 Camp., 654—R. *v.* Hazy, 1826, 2 C. and P., 458. (*n*) Swayne *v.* Fife Bank, 1836, 14 S., 726—See also Purcell *v.* Macnamara, 1808, 1 Camp., 200, 9 East., 361. (*o*) Paxton *v.* Paxton, 1840, 2 D., 1102.

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ship is exempt from the provisions of the Act, must prove the exemption; and in any information, complaint, or process under the Act, the defender must prove any exemption, proviso, or condition, of which he desires the benefit; 18 and 19 Vict., c. 119, § 89. There is a similar provision in the Tweed Fisheries Act, 20 and 21 Vict., c. 148, § 75. So (§ 70 of that Act and § 10 of the Tweed Fisheries Amendment Act, 22 and 23 Vict., c. 70) any person having foul salmon in his possession must prove that they were not taken from the river contrary to the provisions of the Act. The proof that herrings or herring fry, sold, disposed of, or possessed, during the annual close time by any person in the localities adjoining the west coast of Scotland, were not taken contrary to the enactments relative to the Scotch Herring Fishery, lies on the party accused; 24 and 25 Vict., c. 72, § 1. The English Act 1 and 2 Will. IV, c. 32, provides, § 42, "that it shall not be necessary in any proceeding against any person under the Act to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence; but the party seeking to avail himself of any such certificate, license, consent, authority, or other matter of exception or defence, shall be bound to prove the same." This Act, so far as relating to *licenses to deal in game*, is extended to Scotland; 23 and 24 Vict., c. 90, § 13. Thus, also, if a person sells an article with a false trade mark, or with the trade mark of another person and without authority, and neglects or refuses on demand by a Justice of Peace to tell from whom he got it, such neglect or refusal is deemed *prima facie* evidence of his knowledge that the trade mark was false or used without authority; 25 and 26 Vict., c. 88, § 6. On similar principles, the Merchant Shipping Act of 1862 provides, § 28, that in case of damage to person or property arising by the non-observance of any regulation made under the Act, the damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown that circumstances made a departure from the regulation necessary; 25 and 26 Vict., c. 63, § 28.

It is not easy, however, to define the limits of this exception; as, in one sense, every averment on which a party relies is essential to his case. Its proper province seems to be where the negative averment is the foundation of the libel or of some special defence, and is not merely a denial of an affirmative allegation on which the opposite party has in the first instance to found.[17]

§ 12. It is not always necessary for the party bearing the burden to prove his case out and out. He will satisfy the onus by proving a fact which, in the absence of contrary evidence, raises a presumption that his averment is true (*p*). Upon his doing so, the burden is reflected on to the other party, by whom it must be borne until he again can stand upon some fact of presumption, which, unless redargued, warrants a decision in his favour. Thus, while the pursuer of a declarator of bastardy must bear the onus in the first instance, he has only to prove that the defender was habit and repute a bastard in order to throw on him the burden of proving his legitimacy (*q*). On this ground, where a daughter raised an action of reduction of a service obtained by a nephew of their common ancestor, and the nephew alleged that she was illegitimate, the daughter being *in petitorio* had to stand pursuer of the issue whether she was the deceased's legitimate daughter, in order to make out a *prima facie* case of legitimacy; but it was observed on the bench that the onus "may

(*p*) 1 Starkie Ev., 421. (*q*) K. Adv. *v.* Craw, 1669, M., 12,637—Cunningham *v.* Montgomery, 1670, M., 12,637—Bank., 1, 5, 52—Ersk., 3, 8, 66—Lindsay *v.* Kerr, 1821, 2 Sh. Ap. Ca., 148. The report of Lindsay *v.* Kerr in the House of Lords states that the question in the text was raised in that case; but the pleadings show clearly that the parties were agreed as to the law, and that they only differed as to whether the habit and repute had been proved.

[17] Where a daughter, whose mother had died in Scotland, sued her father for her share of the goods in communion, and the father defended on the ground that the law of Scotland did not apply, because he was not domiciled in Scotland either at the date of the marriage or at the date of its dissolution, the Lord Ordinary thought that as the question of domicile was raised in defence, the defender should lead in the proof. But the Court decided that the onus of proving a Scotch domicile at the dissolution of the marriage lay on the pursuer, as it was the basis of her case, but that the defender should undertake the proof of a foreign domicile at the date of the marriage, as that was not a part of the pursuer's case but the basis of a special defence; Kennedy *v.* Bell, 1859, 22 D., 269.

When a proprietor diverts running water on his land from its ordinary channel "he must show that he does so in a lawful manner, and is not diverting without returning any water which he does not use for primary purposes,"—*per* Lord Justice-Clerk (Inglis), Hood *v.* Williamson, 8th Feb. 1861, 22 D., 496.

shift in the course of the trial" (*r*).[18] Proof of a certain usage of trade will throw the burden of proving a departure from it in a particular transaction upon the party alleging that fact (*s*). If a party averring insanity proves that the individual in question had been cognosced, he casts on the other party the burden of proving sanity (*t*); and proof that the granter of a deed was naturally weak and facile, although legally capable of making a deed, has been held to reflect the burden of proving that he fully understood the particular deed upon the party claiming under it (*u*). In the same way, in reductions on the head of deathbed, the pursuer has only to prove that at the date of the deed the deceased was ill of the disease of which he died; whereupon the defender must make out his exception that the deceased survived sixty days (*w*), or went to kirk and market(*x*). In an action of damages against a railway company or coach proprietor, for injury sustained through the fault or negligence of the defenders, or their servants, or through the insufficiency of their carriages or works, where the defenders admit the injury, but deny that it was occasioned by any fault or defect for which they are responsible, it is enough for the pursuer to shew that it arose from the insufficiency or fault alleged, whereupon the defenders will have to prove that the defect was one for which they are not responsible (*y*). Nay more, the fact that the machinery gave way, when applied to its proper purpose, raises the presumption of its insufficiency, and throws on the defenders the burden of proving the opposite (*z*).

§ 13. The onus may shift in consequence of the presumption arising from unexplained mora to bring forward a claim (*a*), or

(*r*) Gilchrist *v.* Whicker, 1852, 14 D., 919. (*s*) See Stewart *v.* Gordon, 1831, 9 S., 466. (*t*) Ivory's Ersk., p. 200, note 241—Bell's Pr., § 2103.

(*u*) White *v.* Ballantyne, 1823, 1 Sh. Ap., 472, reversing. (*w*) 1696, c. 4.

(*x*) Adam on Ju. Tr., 62—Hogg *v.* Nimmo, 4 Mur., 301—Hardie *v.* Macall, 1847, 9 D., 698. (*y*) M'Glashan *v.* Dundee and Perth Ry., 1848, 10 D., 1397—Macauley *v.* Buist, 1846, 9 D., 245—Anderson *v.* Pyper, 1820, 2 Mur., 269—Cargill *v.* Dundee and Perth Ry., 1848, 11 D., 216—See also Sneddon *v.* Addie, 1849, 11 D., 1161.

(*z*) Per Lord Fullerton in Macauley *v.* Buist, *supra*. His Lordship observed that in such a case the pursuer is not bound to prove a specific defect; but it is enough if he shews that the accident took place in circumstances which raise the presumption of a defect, as where a crane when at work flew to pieces. Upon this ground, proof that a stage-coach broke down lays on the proprietor the burden of proving its sufficiency; Lyon *v.* Lamb, 1838, 16 S., 1188. (*a*) Sinclair *v.* Brown, 1837, 15 S., 770. This does not hold if the delay is not beyond that occurring in the usual course of business, or if it can be otherwise satisfactorily accounted for; Armstrong *v.* Edin. and Leith Shipping Co., 1825, 3 S., 464.

[18] Swinton *v.* Swinton, 1862, 24 D., 833—see *supra*, § 8, note 3.

challenge items in an account (*b*),[19] and this applies forcibly to the presumption springing from acquiescence (*c*).

§ 14. In criminal cases also the prosecutor may shift the burden of proof on to the prisoner, by proving facts which lead to a legal presumption of guilt.[20] Thus in cases of murder, the malice essential to the crime "is inferred *prima facie* in the act itself of intentional killing; and it lies therefore with the panel to overcome this presumption by evidence on his part of some of those circumstances of necessity or excusable infirmity, which may serve him for a defence" (*d*). If treason is proved, and knowledge of it is traced to the prisoner, he is in strictness bound to prove that he discovered it to some person, otherwise undue concealment will be presumed (*e*). Thus also Baron Hume thinks that in a prosecution for marrying without proclamation of banns, the prosecutor, by proving that no certificate of proclamation was produced to the minister at the marriage ceremony, transfers to the panel the burden of proving that the proclamation was duly made (*f*). Much reliance, however, should not be placed on such precedents in criminal cases, which are usually too full of specialities to admit of being fixed rigidly by rules as to conflicting presumptions. Effect should always be given to a reasonable ground for inferring innocence, although a nice adjustment of opposing probabilities should lead to a contrary result (*g*).

§ 15. It may be added that, generally speaking, less strong evidence will shift the burden when the party bearing it has to prove a negative, than when he has to prove an affirmative (*h*).

(*b*) Cunningham *v.* Duncan, 1837, 2 Sh. and M'L., 984, aff., 12 S., 678—Rose *v.* M'Leay, 1837, 2 Sh. and M'L., 958, aff., 8 S., 1037, 11 S., 546—Condie *v.* Stewart, 1834, 13 S., 61—Smith *v.* Maxwell, 1833, 11 S., 323—See also Thomson *v.* Murray, 1824, 3 S., 297.[19] (*c*) Cases in preceding note. (*d*) 1 Hume, 254—1 Al., 49—Blackst., 4, 201. (*e*) R. *v.* Thistlewood, 1820, 33 How, St. Tr., 691—Taylor, 270. (*f*) 1 Hume, 466. (*g*) See this subject fully treated in the title on Presumptive Evidence, *infra*. (*h*) See this observed as to the pursuer proving want of probable cause in an issue of judicial slander and malicious prosecution; per Just.-Cl. Boyle, in Hallam *v.* Gye, 1835, 14 S., 199—see also R. *v.* Thistlewood, *supra*—1 Hume, 466—Elken *v.* Janson, 1845, 13 M. and W., 655.

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[19] Maclaren or Law *v.* Wilson, 1862, 24 D., 577.

[20] This rule is applied in various statutes. For example, to warrant conviction for selling spirits in premises without a certificate, it is sufficient "in the absence of contrary evidence" to prove that some person other than the owner or occupant was at the time found there drunk and drinking, and that such premises are, by repute, kept as a shebeen, or had the utensils and fittings usually found in houses licensed for the sale of spirits; 25 and 26 Vict., c. 35, § 19—see *supra*, § 10, note 17.

§ 16. On the other hand, the burden of proof is not transferred by slight presumptions, but by those which are direct and tangible, and to which one is shut up as the inference fairly deducible from the circumstances. Accordingly, where the pursuer of an action of damages for malicious prosecution had to prove want of probable cause, it was held not enough for him to prove the defender's non-appearance at the trial of the case complained of, because there may be good grounds for preferring an indictment, although it may be unjust to carry it to a trial (*i*). On the same principle, proof of the act of suicide does not satisfy the burden of proving insanity shortly before death (*k*). Where a disposition *ex facie* absolute was averred to have really been granted in trust, the disponee's statement that the narrative of the price paid was untrue, but that notwithstanding of this the disposition was absolute, was held not to lay on him the burden of disproving the allegation of a trust (*l*).[21] Nor is the presumption of onerosity in favour of the holder of a bill of exchange removed by his admission that the particular value specified in it was not the value really given (*m*).[22] But sus-

(*i*) Per Ellenburgh in Purcell *v.* Macnamara, 1806, 1 Camp., 200, 9 East., 361—See also Swayne *v.* Fife Bank, 1836, 14 S., 726, where the onus of proving want of probable cause was held not to be satisfied. (*k*) Walker *v.* Macadam, 1806, 1 Dow, 187. (*l*) Chalmers *v.* Chalmers, 1845, 7 D., 865. (*m*) Winton *v.* Gibson, 1831, 9 S., 662.

[21] In Walker *v.* Buchanan, Kennedy & Co., 1857, 20 D., 259, a question occured as to the burden of proof in reference to a deed *ex facie* absolute, admittedly granted at first in security, but of which the qualification had, it was alleged, been cancelled by mutual consent. The representatives of an annuitant raised an action of count and reckoning against parties to whom the right to the annuity had been conveyed by an assignation *ex facie* absolute. The defenders admitted that it was at first an assignation in security merely, and had been qualified by a back-letter; but they averred that the back-letter had afterwards been given up and cancelled, and that it was agreed that the transaction should be held to be an absolute assignation. This alleged change in the transaction was denied by the pursuers. Lord Ivory (Lords President (M'Neill) and Curriehill concurring) thought the case materially different from the case of a right constituted originally by a deed *ex facie* absolute and unqualified. To that case the presumptions of statute applied, and the onus was exclusively on the party who challenged the absolute nature of the deed; but the same presumptions did not apply to the case of a right which, though *ex figura verborum* conceived in an absolute form, was, in the primary act of its constitution, given and intended to operate as a security merely; in that case the question was not one of constitution but of alteration, and the burden of proof rested on the party alleging the alteration in the transaction. Lord Deas held that the case was one in which the pursuers had failed to adduce the statutory proof of trust.

[22] But where in a suspension, by the acceptor of a bill for value received, of a charge by the drawer, the charger stated that the bill had been drawn and negotiated for the purpose of obtaining money for a joint adventure in which the suspender and he were

picious circumstances, combined with a false narrative of payment of a price, will lay the burden on the party claiming under the deed (*n*).[23] A *prima facie* proof will sometimes be sustained where the party against whom it is adduced can easily redargue it, if it be erroneous. For example, in an action of damages for injury caused by the negligence of the defenders' servant when in charge of their carriage, the pursuer was held to have discharged the burden of proving ownership by showing that the carriage bore the defenders' nameplate (*o*); and the burden of proof as to the driver being their servant was shifted by showing that he had stated so at the time of the accident (*p*). In such cases the pursuer must adduce some evidence of the ownership or employment, because it is the foundation of his case; but a *prima facie* proof will suffice, as it is a fact which lies peculiarly within the defender's knowledge (*q*). It has been held that a woman claiming parochial relief for her child has a *prima facie* case, sufficient to lay on the parochial board the burden of proving that she can maintain both herself and it (*r*).[24]

(*n*) Hotson *v.* Paul, 1831, 9 S., 685. (*o*) Gilchrist *v.* Ballochney Rail. Co., 1850, 12 D., 979. (*p*) M'Laren *v.* Rae, 1827, 4 Mur., 382; per Lord Chief Commissioner. But this case may be questioned, in so far as it admitted hearsay as *prima facie* evidence of a fact in the cause. (*q*) Compare §§ 9 and 12. (*r*) Mackay *v.* Baillie, 1853, 15 D., 971.[24]

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the partners, that the adventure resulted in loss, which loss he, the charger, had paid; that the suspender fell to pay a part of that loss, and that he, the charger, restricted his charge to the amount so due by the suspender; the majority of the Court held that the bill afforded no presumption of value, and that the charger required to prove the joint adventure on which he founded; Blackwood *v.* Hay, 1858, 20 D., 631.

[23] "Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given him for the same; but such proof may be made by parole evidence."—19 and 20 Vict., c. 60, § 15.

In England, illegality or fraud in a previous holder throws on an indorsee the burden of proving consideration. But mere want of consideration on the previous holder has no such effect; Fitch *v.* Jones, 1552, 2 Ellis and Blackburn, 238, 244.

The indorsee of a bill or note indorsed after it has become payable (and after the passing of the Mercantile Amendment Act) is subject to all exceptions competent against the indorser; 19 and 20 Vict., c. 60, § 16.

[24] In Laing *v.* Adamson, 1857, 19 D., 749, the Lord President (M'Neill), expressing the opinion of the Court, said "We do not consider that the case of *Mackay* fixed any abstract or absolute rule that, in such an application as the present, by a woman with one child, the burden of proving that she is able to support that child is necessarily laid on the parochial board. That depends on the circumstances of each case. The circumstances for consideration may vary much, and little may turn the onus one way or another."

A party pleading on an instrument as a will holograph of the granter, maintained that he sufficiently discharged the onus incumbent on him by proving that it was all in one handwriting, and that, after that was proved, the presumption was in favour of the authenticity of the will; and he referred to the observations of Lord Jeffrey in Turnbull *v.* Doods, 1844, 6 D., 903, as supporting that position. But the Court held that the onus lay on the party propounding a document as a holograph will, to prove, not only that the deed was all in one handwriting, but also that it was the deed of the alleged granter, and that Lord Jeffrey's observations could not be regarded as establishing any contrary doctrine. The judgment was affirmed on appeal; Anderson *v.* Gill, decided 25th June 1850, but reported in 20 D., 1326, affirmed 1858, 3 Macqueen, 180. "When there is a question of the authenticity of writing, the evidence in the case of deeds *mortis causa* requires to be more satisfactory than in that of deeds *inter vivos*, especially if in the latter case the alleged writer is still alive"—*per* Lord Mackenzie in Anderson *v.* Gill. Lord Fullerton thought that the circumstance, that such a document was found in the proper repositories of the deceased, might transfer the onus and throw on the other party the necessity of showing that the document produced was a forgery.

Since a man can hardly, without immediate detection, intrude himself unauthorised into a public office, the onus of proving that a person acting in an official capacity was duly appointed, is easily discharged. Thus, in a criminal prosecution for assaulting an officer of the law, the appointment of the officer is proved sufficiently by his own oath, if there be no evidence to the contrary. This rule was applied in the case of an assault on water bailies under the Tweed Fisheries Acts. So, in a trial of a panel for having, as post-master, infringed the Post-office Statutes, parole proof of the panel's appointment was received by Lord Ardmillan on Circuit, though it was proved that there was a written appointment by the Post-master General, which was not produced. In like manner, in proceedings under the Passengers Amendment Act, the oath of a party that he is an Emigration Officer, or a Custom-House Officer, is sufficient proof of his appointment, if there be no contrary evidence; Lord Advocate *v.* Smith and Milne, 1859, 3 Irvine, 507, 513—Lord Advocate *v.* M'Leod, 1858, 3 Irvine, 79, 91—18 and 19 Vict., c. 119, § 90—Best on Evidence, 458—Taylor, 155, 3d edition, and cases there quoted.

The following note as to the rules of evidence in Excise cases, showing the number of averments in an information which the prosecutor does not require to prove, is extracted from Bateman's "Excise Laws," p. 79, note (*p*):—"The general rule of evidence on the trial of a penal information is, that where the facts that constitute the offence are all of a *positive* nature, they must be established in evidence affirmatively by the prosecutor. But where they are of a *negative* nature, and afford ground of defence and exemption from penalties, especially when such exemption comes by way of proviso in a separate clause or Act of Parliament (Rex *v.* Jervis, 1 East., 647), they must be proved by way of defence on the part of the defendant. The former part of this rule, however, is greatly modified in favour of the prosecutor in Excise cases; in which several formal, and indeed substantial proofs are allowed to be dispensed with, or taken for granted unless the contrary be proved. Thus an averment that a person is a commissioner, or officer, or office-keeper, is to be proved by the fact of his having acted as such (7 and 8 Geo. IV, c. 53, § 17). And an averment that the Board has ordered a possecution or made an election therein, is to be deemed sufficient without proof (7 and 8 Geo. IV, c. 53, § 71; 4 and 5 Will. IV, c. 51, § 28). And a Treasury order or Board's order, may be proved by the official letters, communicating the same to the officer (7 and 8 Geo. IV, c. 53, § 72). An entry may be proved without producing the original, and a non-entry by the general entrybook (7 and 8 Geo. IV, c. 53, § 19). And an averment that a person is an excise trader, may be supported, although he carries on the trade without entry. A person may be proved to be unlicensed by general

evidence; the production of his license, if he has one, rests upon himself. Survey books and specimen papers are evidence of the facts therein entered; and it is a rule of the Court of Exchequer to admit in evidence extracts and calculations from such books, if the books themselves be in Court. Permits may be proved by the counterpart and request note (2 Will. IV, c. 16, § 19). A judgment of condemnation in the Exchequer is conclusive evidence to all the world. The onus of proof of payment of duty, or of the identity of goods mentioned in a permit, lies on the defendant or claimant (7 and 8 Geo. IV, c. 53, § 76; 2 Will. IV, c. 16, § 28; and 3 and 4 Will. IV, c. 53, § 29). In all cases of seizure the events are to be proceeded upon without inquiry into the fact or form of seizure (7 and 8 Geo. IV, c. 53, § 64). And, generally, defects in form of informations in summary proceedings are to be disregarded (7 and 8 Geo. IV, c. 53, § 73).

"In penal informations a day certain is always fixed for the commission of the offence, but to support such statement or allegation it is not necessary to prove that the offence was committed on the day named. If it is proved to have been committed on any day before exhibiting the information, and within the time limited by law, that i sufficient to support the information." . . . . "So with respect to the *place*, the evidence is not tied up to the place laid, and may be of any place, provided it be not out of the magistrate's jurisdiction." . . . . "So with respect to *quantities* and *numbers*. Certain quantities and numbers are always stated in the information, but if a larger quantity, or a greater number, is stated in the information than is proved by the witnesses, still it will not vitiate the information." . . . . "But if the quantity and number proved be *more and greater* than the quantity and number stated in the information, the quantity and number stated in the information can only, on the hearing of such information, be condemned. So when an information charges an offence to be committed in *various ways*," . . . . "if the offence is proved to have been done by any one of these methods, it will be sufficient to maintain the information."

"Prior circumstances leading to the fraud, in respect of which a seizure has been made, are admissible as circumstances to weigh with the jury, to prove that such fraud was carried on."

In Excise and Customs cases, informers and officers are, under the Excise Statutes, competent witnesses (7 and 8 Geo. IV, c. 53, § 75, and 3 and 4 Will. IV, c. 53, § 118).

TITLE II.

OF THE RULE THAT EVIDENCE MUST BE RELEVANT.

CHAPTER I.—OF THE RULE GENERALLY.

§ 17. The proper object in every trial being to lead the jury to a correct verdict upon the issue, it is the practice to exclude evidence which cannot afford an inference on some point in favour of either party. This is done in order to prevent time being uselessly consumed, and the attention of the jury being diverted from the real question, and also to prevent evidence from being led which the opposite party cannot have anticipated, so as to be prepared to contradict it (*a*). It frequently happens, however, in the course of a trial, that the relevancy of material facts is not at once apparent. The Court has therefore to rely a good deal on the discretion and fairness of the counsel conducting the case, and they will rarely reject proof of facts, merely because at the time they appear to be irrelevant, if the counsel states on his professional responsibility that they are material (*b*). There is much greater risk of injustice from excluding than from admitting evidence objected to as irrelevant; and the Court can always caution the jury against being misled by it, if it should turn out to be objectionable. The length to which this ground for exclusion is carried will be seen from the following illustrations.

§ 18. In an action against the proprietor of a journal for libel, it is incompetent to prove that similar libels were contained in other journals, because they may all have been untrue (*c*). It is

(*a*) 1 Phil., 460—Taylor, 238. In proofs by commission there is little or no risk of misdecision from this source; the chief objection is the waste of time. But in jury trials there is risk of misdecision also. Wherever facts have been found irrelevant, they will not be allowed to be proved; M'Laren *v.* Buik, 1829, 7 S., 780. (*b*) This is also the English practice; 2 Starkie Ev., 313—1 Starkie Ev., 603—Haigh *v.* Belcher, 1836, 7 C. and P., 389. A striking illustration of the leniency of the Court in this respect is seen in Rush's case, which was conducted by the panel himself; Sep. Rep., pp. 26, 32. (*c*) Aiton *v.* M'Culloch, 1823, 3 Mur., 238—Leslie *v.* Blackwood, 1822, 3 Mur., 181.

incompetent in an action of divorce for adultery to prove the alleged paramour's loose and unbecoming behaviour with other persons than the defender, or his suspension from the clerical office (*d*). But the pursuer in an action either of divorce or of damages for adultery, may prove the general behaviour of the paramours towards each other, and even facts not specially averred, which indicate unusual intimacy between them about the time libelled on (*e*).[1] Under an issue of forgery of the signature of one of three alleged parties to a bill, that party was allowed to prove that another of the signatures was forged; but correspondence between the agents of the parties after the bill fell due was only allowed to be used for proving an admission of genuineness in the signatures, not in order to shew liability on another ground (*f*). It is also relevant in such cases that the party's name had been forged to other bills in similar circumstances (*g*), and that the drawer or holder is a notorious forger (*h*).[2] In an action of damages for a nuisance to the pursuer's

(*d*) King *v.* King, 1842, 4 D., 590. (*e*) King *v.* King, *supra*—Springthrope, 1830, 8 S., 751—1 Fraser, 664—But in Baillie *v.* Bryson, 1818, 1 Mur., 828, the Lord Chief Commissioner would allow evidence only of general behaviour, not of particular facts. (*f*) Gellatley *v.* Jones, 1851, 13 D., 961. (*g*) Troup *v.* Begg, 1838, 1 D., 356. (*h*) Milne *v.* Littlejohn, 1838, 1 D., 137.

[1] In an English case, the pursuer of a divorce was allowed to give evidence of acts of adultery between the alleged paramours, of later date than the last act charged in the petition, for the purpose of shewing the character and quality of the previous familiarity; Boddy *v.* Boddy, 1860, 30 L. J., Mat. Cases, 23. In a divorce by a wife, evidence of repute as to the paternity of the illegitimate children of the paramour was rejected; A *v.* B, 1858, 20 D., 407. In a divorce, the defender (the husband) tendered as a witness a medical gentleman, for the purpose of proving that he had inspected the alleged paramour, and found her to be *virgo intacta*. The Court rejected the evidence, because such evidence should not be resorted to except of necessity, and because, if allowed at all, the inspection should be by a neutral person appointed by the Court, seeing that, as the alleged paramour was not bound to submit to a second inspection, the pursuer could not test the evidence offered; Davidson *v.* Davidson, 1860, 22 D., 749.

[2] In a reduction of a trust-deed and two codicils one question was, whether they were not unauthenticated, in respect of the granter having signed after the witnesses. The Lord Justice-Clerk (Inglis), in charging the jury, observed, that if the jury were satisfied that the witnesses had signed one of the deeds before the granter had signed it, that was a material circumstance to be taken into account, in considering whether the other deeds had been attested by the witnesses in the same way; because, as it was of course the testator's purpose to have his deeds well authenticated, the fact that the witnesses had signed one of them, without seeing him sign or hearing him acknowledge his signature, indicated an erroneous notion on his part with regard to the testing of deeds; and if he thought the one deed so attested well authenticated, it was not difficult to suppose that he might have got the others attested in the same manner; Morrison *v.* Maclean's Trustees, 1862, 24 D., 625, 630.

property from the defender's works, one of the defender's witnesses having deponed, on cross-examination, that he knew Glasgowfield, a property adjoining the works, but that he never heard of any damage being done there, the pursuer was not allowed to ask him, whether he knew of any sum having been paid by the defenders to the proprietor of Glasgowfield for alleged damage (*i*). In an action against a mercantile company for executing orders which they knew were intended for the pursuers, it was held incompetent to prove that they did so on an occasion ten years before (*k*). Proof of a similar act within a recent period would probably have been received. In an action for recovery of property alleged to have been fraudulently acquired the defender is not obliged to undergo a judicial examination as to how he made his own fortune (*l*). Where the defence to an action on a policy of insurance was, that the ship's crew were drunk and inattentive, and the compasses unfit, the pursuer was not allowed to prove that other sailing masters were afraid of their vessels on account of hazy weather at the time of the wreck (*m*). Where a party pleaded probable cause in defence to an action for having in the year 1820 stated to officers of police that the pursuer had committed a forgery, he was not allowed to prove that information had been given to the public prosecutor in 1817 as to the offence; the proof being irrelevant owing to the length of time intervening, although it would have been relevant if near the period in issue (*n*). And on the same ground a letter of a recent date is, while one of an old date is not, relevant evidence of provocation in an action of damages for insult or defamation (*o*).[3]

§ 19. It was once held incompetent in a question of paternity to prove a likeness between the alleged father and child, because it was "too much a matter of fancy and loose opinion" to aid in de-

(*i*) Tennant and Co. *v.* Hamilton, 1839, M'L. and Rob., 821, reversing 1 D., 502.

(*k*) Dickson & Sons *v.* Dickson & Co., 1830, 5 Mur., 223—See also Dicksons Brothers *v.* Dickson & Co., 1816, 1 Mur., 55. (*l*) Gordon *v.* Campbell, 22d Dec. 1809, F.C.—M'Candlish *v.* Forbes, 1825, 4 S., 58. (*m*) M'Loskey *v.* Glasgow and Clyde Co., 1843, 6 D., 2. (*n*) Gibsons *v.* Marr, 1823, 3 Mur., 268. (*o*) Hyslop *v.* Staig, 1816, 1 Mur., 21—see also Bannerman *v.* Fenwicks, 1817, 1 Mur., 252.

[3] In a reduction of deeds granted by the pursuer, the pursuer took two issues—(1) of insanity, (2) of facility and lesion. The defender was not allowed to take an issue of homologation in answer to the issue of insanity, but he was allowed, in opposition to the pursuer's second issue, to take an issue whether, when the pursuer was not labouring under weakness of mind and facility, he homologated the deeds. The Lord Justice-Clerk (Hope) dissented, and thought that the defender should raise a declarator to establish his plea of homologation; Gall *v.* Bird, 1855, 17 D., 1027.

ciding the case correctly (*p*). But in the Douglas cause (*q*) this evidence was not only admitted without objection, but was dwelt upon by Lord Mansfield; who observed, "I have always considered likeness as an argument of a child being the son of a parent;" while Lord Chancellor Camden said of the claimant, that his complexion and the colour of his eyes and hair proved that he was not the child of the person from whom it was contended he had been bought. The prosecutor in a trial before the Justiciary Court for child-murder, after proving that the child had six toes, was allowed to ask a witness whether any members of the panel's family had supernumerary fingers and toes (*r*), the fact being palpable, although the inference to be deduced from it was only matter of opinion. The Court of Session, however, held it incompetent in a question of insanity to prove insanity of the party's relations (*s*); but on the case going to the House of Lords on another branch, Lord Chancellor Eldon spoke of this as a "very delicate point" (*t*). Several years after this case, the counsel for a panel, who pleaded insanity in defence to a charge of murder, put a question to a witness in order to prove hereditary insanity, whereupon it was observed from the bench that the House of Lords had held such evidence to be incompetent (*u*). The Crown counsel, however, did not press his objection; and the question was put, but without eliciting any information. Where a panel pleaded insanity, evidence that his maternal aunt had been insane was rejected (*v*).[4]

(*p*) Rutlidge *v.* Carruthers, 20th Jan. 1810, F.C. (*q*) 1769, 2 Pat. App. Ca., 142, 177. In the Townsend Peerage Case, in May 1843, the House of Lords admitted and used evidence of family likeness; 79 Journ. House of Lords, 201. (*r*) Laird, 1848, Arkl., 471. So a white man was held not to be the father of the mulatto child of a white woman, although he admitted having had connection with the mother; Sinclair *v.* M'Arthur, 12th Nov. 1812 (not rep.), noted in 2 Fraser, 8, and Hume Sess. Papers, winter 1812-13, vol. i, No. 5. (*s*) Walker *v.* M'Adam, 1806, M. Proof App., No. 3. (*t*) M'Adam *v.* Walker, 1813, 1 Dow, 148, 177, 5 Paton Appeals, 675. This evidence was received without question as to its competency in Smythe *v.* Chamberlayne, 1792, reported in App. to the Gardner Peerage Case, p. 352. (*u*) M'Leod, 1838, 2 Swin., 88, per Lord Cockburn. His Lordship probably referred to the case of Walker *v.* M'Adam above noted (*t*). (*v*) Gibson, 1844, 2 Broun, 332.

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[4] Lord Deas, at Circuit, refused to receive, in support of a plea of insanity, evidence that the paternal uncle of the panel had been insane; Lord Advocate *v.* Brown, 1855, 2 Irvine, 154.

Evidence of hereditary insanity is not inadmissible in England; Freere *v.* Peacocke, 1842, and Tyrell *v.* Jenner, 3 Curt., 664, 669.

In an action of damages for wrongful confinement in a lunatic asylum, the defender was allowed to recover and put in evidence private memoranda written by the pursuer

In a question whether a party left his property past his relations, proof is received of the terms on which he lived with them, as tending to shew the probabilities as to his conduct (*x*).

§ 20. Sometimes the want of a connecting link will cause evidence to be rejected which would otherwise have been received.[5] Thus it is incompetent in a question of the current price of goods (pickled herrings) in the home market, to prove the prices in a foreign market of similar goods, not proved to have been of the same manufacture or lot (*y*). But the price of one set of goods may be evidence as to the price of another set in the same market, if proved to have been made at the same time, and by the same manufacturer, or of the same lot of metal; or in the case of wine, if they have come from the same butt or cask (*z*). The current prices of goods even of a different manufacture may be evidence in a question whether those in issue, and for which a certain price was agreed to be paid, were warranted as of the best quality (*a*). In England in an action of trespass in one part of a continuous belt of planting, the plantiff may prove his acts of ownership in another

(*x*) As in Murray *v.* Tod, 1817, 1 Mur., 225—Buchanan *v.* Buchanan, 1810, Buch. Rep., 89. This is the constant practice in such cases. (*y*) Whealler *v.* Methuen, 1843, 5 D., 402, 1221—See also Wilson *v.* Gordon, 1828, 6 S., 1012, where the Court, in an action for payment of plaster-work executed in Glasgow, refused the defender a commission to examine witnesses in London as to the charges there in support of his defence that the work was overcharged. (*z*) Bailey *v.* Paterson, 1828, 4 Mur., 480—Whealler *v.* Methuen, *supra*, per Lord Medwyn. If the pursuer proves that other articles of the same kind manufactured by him were good, the defender may shew that some were bad; Bailey *v.* Paterson, *supra*. (*a*) Whealler *v.* Methuen, *supra*, 5 D., 1221.

when in the asylum, because although (*per* Lord Deas) it was a valuable general principle in criminal cases that documents which had not been delivered or published ought not to be brought up against a party any more than his own private thoughts, yet in an inquiry as to sanity, what was wanted, was to know the man's private thoughts.

[5] In an action of divorce by a wife, a letter written by the parish minister to his assistant in reference to the baptism of a child, said to be the illegitimate child of the defender, was held to be admissible in evidence, having been shown to the defender, and commented on by him in a subsequent letter. On the other hand, a letter on the same subject by the assistant to the minister, which had not been shown to the defender, was held inadmissible; A *v.* B, 1858, 20 D., 407.

A letter by a deceased solicitor, purporting to be written on the authority of A, and coming from the custody of the person to whom it was addressed, was held not receivable in evidence, as a letter written by authority of A; Bright *v.* Legerton, 1861, 30 L. J. Ch., 338.

A complaint in a Police Court, libelling that the panel had received goods knowing them to have been stolen, was quashed as irrelevant, because there was no averment that the goods had been stolen; Donaldson *v.* Buchan, 1861, 4 Irvine, 109.

part of it (*b*). In a question whether packages of yarn were deficient in quantity the pursuer was allowed to prove that some packages which had been furnished under the same contract, and which he had rejected, were deficient (*c*). In an action of declarator by a house-proprietor in a royal burgh, to establish a servitude of drawing water, possession by the other inhabitants, as well as by the pursuer and his authors, is relevant, all the inhabitants being united under the corporation (*d*); and the same rule applies to a burgh of barony (*e*). But the opposite has been held as to inhabitants of a village who have no such common tie (*f*). So in a question of prescriptive right to a servitude of road, the proof was limited to the possession of the proprietor of the dominant tenement and his tenants, and was not allowed to embrace possession by tenants upon other properties (*g*). A right of public road, however, may be vindicated by any member of the community; and traffic along it by the public generally may be proved (*h*). In a question as to the interpretation of a statute imposing an assessment, the House of Lords held it not relevant to prove the practice followed as to payment by other individuals assessed, the defender not being a party to their acts (*i*). But it is otherwise when a right to levy dues is maintained on the ground of usage (*k*); and where a general proof of usage is allowed in order to explain an ambiguous clause in the statute imposing the duty (*l*). In the trial of the Earl of Macclesfield for taking payment for offices in his appointment as Lord Chancellor, he was allowed to prove that payments had been received on appointments by previous Chancellors, in order to make good his defence that it was the ancient practice

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(*b*) Stanley *v.* White, 1811, 14 East., 332—See also a similar case as to trespass in the bed of a river; Jones *v.* Williams, 1837, 2 M. and W., 326. (*c*) Gibb *v.* Wathen & Co., 1829, 5 Mur., 63. (*d*) Thorburn *v.* Charteris, 1841, 4 D., 169. This holds as to other servitudes also; Sinclair *v.* Town of Dysart, 1780 (House of Lords), M., 14,519. (*e*) D. Hamilton *v.* Aikman, 1832, H. of Lords, 6 W. S., 77, per Wynford—Home *v.* Gray, 1846, 9 D., 286; 19 S. Jur., 109, and authorities cited there—But see Feuars of Dunse *v.* Hay, 1782, M., 1824. (*f*) Feuars of Dunse *v.* Hay, *supra*—M'Kenzie *v.* Learmonth, 1849, 12 D., 132. (*g*) E. Morton *v.* Stewart, 1813, 1 Dow, 91—But see M'Ghie *v.* M'Kirdy, 1850, 12 D., 442; and Rodgers *v.* Harvie, 1829, 7 S., 287. (*h*) The Glentilt case, 1850, 12 D., 328; aff. 1852, 1 Macq., 65—Mercer *v.* Reid, 1840, 2 D., 520—Mercer *v.* Rutherford, 1840, 2 D., 616. (*i*) Ewing *v.* Burns, 1839, M'L. and Rob., 435, 456. (*k*) Town of Lauder *v.* Brown, 1754, 5 Sup., 819, and M., 1987—Hill *v.* Mag. of Edinburgh, 1830, 8 S., 449—Cowan *v.* Mag. of Edinburgh, 1828, 6 S., 586—Dempster *v.* Dundee Sea Box, 1831, 9 S., 313. (*l*) Girdwood *v.* Campbell, 1829, 7 S., 840, and 1830, 9 S., 170—E. of Aboyne *v.* Town of Edinburgh, 1775, M., 1972—See a similar principle recognised in Mag. of Dunbar *v.* Her. of Dunbar, 1835, 1 Sh. and M'L., 195–202.

and a perquisite of the office to do so (*m*); but the proof was limited to the same appointments as those laid in the impeachment (*n*).

In a trial for poisoning a child with king's yellow, the panel's counsel asked a witness whether he knew of any instances in Apothecaries' Hall "of mistakes in retailing medicines of as dangerous a nature, as if king's yellow had been sold for sulphur;" but the question was not allowed, as no foundation had been laid for it by proving that the king's yellow administered had been bought there, or that king's yellow had ever been sold for sulphur (*o*).

§ 21. In some of the cases noticed in the preceding paragraphs the evidence was rejected on the principle that *res inter alios actae aliis neque nocent neque prosunt*, and that any inquiry into them is therefore irrelevant (*p*).

The same principle is followed in England (*q*).[6]

(*m*) Trial of E. Macclesfield, 1725, 16 How, St. Tr., 1130. (*n*) Ibid., 1142.

(*o*) Rennie, 1822, Sh. Cr., 82. (*p*) So in an action for demurrage it is incompetent to prove that demurrage was claimed by owners of another vessel under similar circumstances; Wight *v.* Liddell, 1829, 5 Mur., 39—But see a narrow and doubtful case, Gye and Co. *v.* Hallam, 1832, 10 S., 512. (*q*) 2 Starkie Ev., 318—1 Phil., 462—Taylor, 284. Thus the custom in one parish or manor is not evidence of the custom in another, unless they are held by the same tenure, or the custom is general; M. Anglesea *v.* L. Hatherton, 1842, 10 M. and W., 285—Doe *v.* Sisson, 1810, 12 East., 62—Furneaux *v.* Hutchins, 1778, 2 Cowp., 808. The principle stated in the text is also illustrated by Barden *v.* de Keverberg, 1836, 2 M. and W., 61—Smith *v.* Wilkins, 1833, 6 C. and P., 180—Delamote *v.* Lane, 1840, 9 C. and P., 261. Mr Taylor (p. 284) well states the ground for the rule to be, that "the conduct of one man under certain circumstances or towards certain individuals, varying, as it will necessarily do, according to the motives which influence him, the qualities he possesses, and his knowledge of the character of the persons with whom he is dealing, can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man towards other persons."

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[6] When an action is based on a general fact, as negligence, concealment, insanity, or the like, the point sometimes arises, whether the evidence of men of skill or men of business should be brought, to show that the general fact which it is desired to prove is a fair deduction from the evidence, or whether it should be left to the jury to draw that conclusion for themselves. Thus in a trial of an issue whether an insurance of a vessel had been obtained by concealment of circumstances material to the risk, questions to an insurance agent, adduced as a witness, (1) whether, if he had known an alleged fact, he would have disclosed it, and (2) whether certain circumstances were material to the risk, were disallowed, as inquiries as to the witness's individual opinion merely. But the Court treated as an undecided point, on which they abstained from giving an opinion, whether it would have been competent to ask what, in the judgment of the witness, would be the opinion of underwriters generally as to the materiality of the facts,—or whether it ought to be left to the jury to determine for themselves as to the materiality of the facts concealed; Baker & Adams *v.* Scottish Sea Insurance Co., 1856, 18 D., 691. So in the case of Morrison, 1862, 24 D., 631, medical men, as witnesses, were asked

CHAPTER II.—RELEVANCY OF EVIDENCE OF CHARACTER.

§ 22. As evidence of the good or bad character of the parties usually affords little or no aid towards a correct verdict, the general rule is against its admissibility (*r*). On the other hand, this evidence is often important in actions which involve character and conduct; and in such cases it is generally admitted, under certain rules designed for preventing surprise.

First, As to the character of the pursuer and those associated with him in the cause:—

§ 23. In actions of damages for defamation, where the defender takes an issue of *veritas convicii*, or impugns the pursuer's character on record, the pursuer may support his character in denial of the injurious allegations, and in anticipation of the defender attempting to prove them (*s*). Even where the defender has not taken the initiative, the evidence seems competent for the pursuer in this class of actions; because his character, the subject of the alleged damage, is in issue (*t*). Such evidence is of course admissible where the defender has in his proof attacked the pursuer's character (*u*).

Evidence in support of the injured party's character in actions of damages for seduction is relevant in England, both on the question whether the defender seduced her, and on the amount of damage occasioned by his act (*x*).[1] Whether her character can be

(*r*) 1 Phil., 466, 7—1 Taylor, 253—1 Greenl., 72. (*s*) Aiton *v.* M'Culloch, 1822, 3 Mur., 284—Denham *v.* Ogilvie, 1827, 4 Mur., 196—2 Starkie Ev., 805—Taylor, 254. (*t*) Tytler *v.* Macintosh, 1823, 3 Mur., 239—Walker *v.* Robertson, 1821, 2 Mur., 511—Macf. Pr., 216. This has been repeatedly allowed without objection, as in Cullen *v.* Ewing, 1832, 10 S., 497—Ramsay *v.* Nairne, 1833, 11 S., 1033—Brodie *v.* Blair, 1834, 12 S., 944—M'Neil *v.* Rorison, 1847, 10 D., 15. The English practice rejects this evidence unless the pursuer's character has been attacked on record or in evidence; 2 Starkie Ev., 350—1 Phil., 467—Taylor, 253. (*u*) 1 Phil., 468—2 Starkie Ev., 306. (*x*) Bamfield *v.* Massey, 1808, 1 Camp., 460—Bate *v.* Hill, 1823, 1 Car. and Pa., 100—Brown *v.* Goodwin (Irish Circ.), cited in Taylor, 259—2 Starkie Ev., 306. These authorities shew that the English Courts do not follow Dodd *v.* Morris, 1814, 3 Camp. 519; where, in an action of damages by a father for seduction of his daughter, it was held that her cross-examination on her indelicate conduct to the defender would not let in the pursuer's proof of her good character by witnesses generally, but only by re-examining her.

whether, on a consideration of the evidence, they believed a testator to be insane; but the Lord Justice-Clerk (Inglis) told the jury, that that was not a question for the medical witnesses, but that it was for the jury to determine, on a consideration of the facts proved, as to the sanity of the testator.

[1] Such evidence seems admissible in Scotland also; Walker *v.* M'Isaac, 1857, 19 D., 340.

set up, if the defender has not attacked it on record or in evidence, has not been determined.

In charges of rape and assault with intent to ravish, the prosecutor may anticipate the common defence, that the connection was voluntary, by proving the woman's good character, although the defender has not impugned it on record (*y*). But he may not do so at the commencement of the trial (*z*).

Wherever the pursuer has been allowed to support his character, it would seem that the defender may impugn it by counter evidence (*a*).

§ 24. The principle that the pursuer's character is in issue in actions of damages for defamation allows the defender to lead evidence against it, where he has attacked it on record, or taken an issue of justification (*b*). The English authorities are not agreed as to the competency of such evidence where the defender does not justify (*c*). Here it has been admitted where there was no justification (*d*); and the decisions allowing the pursuer to anticipate the defender's evidence in such cases proceed on the assumption of its competency (*e*). In a recent case, however, Lord President Boyle rejected general evidence against the pursuer's character in an action of defamation, because the defender had not attacked it on record or by an issue of justification (*f*).

§ 25. Where the pursuer's bad character is a ground of defence, as in actions of damages for breach of promise of marriage (*g*), and actions laid on dismissal of servants, the defender may prove it; but he will have to take a counter-issue. The falsehood of the slander is presumed in actions for defamation where the defender is not privileged (*h*). But the *veritas convicii* may be proved in defence, provided it is put articulately in a counter-issue (*i*), but not

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(*y*) M'William, 1846, Arkl., 209. The prisoner had stated in his declaration that the connection was voluntary. (*z*) M'William, *supra*. (*a*) Walker *v.* Robertson, 1821, 2 Mur., 511—Cleland *v.* Mack, 1829, 5 Mur., 72. (*b*) Hyslop *v.* Staig, 1816, 1 Mur., 21—Macf. Pr., 216. (*c*) Starkie, vol. ii, pp. 305, 641, and Taylor, 258 (3d edition, 332), are in favour of the admissibility; Philips, vol. i, p. 467 (10th edition, 502), takes the opposite view. The cases are fully noted in all these works. (*d*) Hyslop *v.* Miller, 1816, 1 Mur., 49—Denham *v.* Ogilvie, 1827, 4 Mur., 196—Macf. Pr., 216—See also Lord President Hope's charge in Brodie *v.* Blair, 1836, 14 S., 267, 269. (*e*) *Supra*, note (*t*). (*f*) Bryson *v.* Inglis, 1844, 6 D., 363. This case was compromised before discussing the exception to his Lordship's ruling. (*g*) Foulkes *v.* Sellway, 1801, 3 Esp., 236. (*h*) In cases of privilege the pursuer has to prove that the slander is false; M'Intosh *v.* Flowerdew, 1851, 13 D., 726. (*i*) Scott *v.* M'Gavin, 1821, 2 Mur., 486—Walker *v.* Robertson, 1821, ibid., 512—Paterson *v.* Shaw, 1830, 5 Mur., 281—Brodie *v.* Blair, 1836, 14 S., 267.

otherwise (*j*).[2] Nor can it be proved without a counter-issue, where the defender tenders it in mitigation of damages, and not in justification; for the pursuer has a substantial interest to prevent the damages from being reduced to a nominal sum by means of proof of which he has not had notice (*k*).[3] In actions of this nature, however, the defender, without taking a counter-issue, may prove in mitigation of damages that the slander was not raised by him, but was communicated to him by another person (*l*), or was currently reported at the time (*m*). As such evidence is admitted in order to negative the expressed or implied allegation that the defender is a malicious calumniator, and not to shew that the slanderous statements are true, the defender will be prevented from founding on the proof for the latter purpose, if there is not a counter-issue (*n*). Where a party wrote a letter to another, charging him with having committed a capital crime (meaning rape), and where in defence to an action of damages for the slander he founded on conduct of the pursuer as having given rise to the charge, and in a great measure palliating it, but without amounting to a complete justification, the Court allowed him to prove the conduct in mitiga-

(*j*) Cases in preceding note—M'Neill *v.* Rorison, 1847, 10 D., 15—Scott *v.* Doherty, 1848, 6 D., 5. In Paterson *v.* Shaw, *supra*, a mistake in the *locus* in the counter-issue prevented the truth of the slander from being proved. (*k*) M'Neill *v.* Rorison, *supra*.[1] (*l*) Aitken *v.* Reid, 1819, 2 Mur., 149—Forteith *v.* E. Fife, 1821, 2 Mur., 467—Paterson *v.* Shaw, 1830, 5 Mur., 279—See also Durham *v.* Mair, 1796, Hume, D., 599—Rose *v.* Robertson, 1803, ib., 614—Gardner *v.* Marshall, 1803, ib., 620—M'Kennal *v.* Wilson, ib., 628. (*m*) Scott *v.* M'Gavin, 1821, 2 Mur., 486, per Lord Chief Commissioner—Kingan *v.* Watson, 1828, 4 Mur., 490, per *eundem*—M'Culloch *v.* Litt, 1851, 13 D., 960, per Lord Wood—See also Dougal *v.* Dougal, 1833, 11 S., 1026.

(*n*) Aitken *v.* Reid, *supra*—Brodie *v.* Blair, 1836, 12 S., 941; 14 S., 267, S. C.—M'Culloch *v.* Litt, *supra*. Besides, common report is hearsay of the *veritas*; see § 87.

[2] Friend *v.* Skelton, 1855, 17 D., 548.—*Veritas convicii* (the allegation by the defender of time, place, and circumstances being sufficiently precise) is a complete defence in all actions of damages for slander; Mackellar *v.* Duke of Sutherland, 1859, 21 D., 222. See the previous cases reviewed by the Lord Justice-Clerk (Inglis); Wilson *v.* Weir & Strang, 1861, 24 D., 67.—*Per contra*, "Truth is not always a justification of libel. It may be an aggravation, as where the allusion is to a bodily defect, or to a family misfortune, for which the party taunted was not to blame, and which he could not help; or it may be, at best, only a ground of mitigation, as where an individual in every company, and on every occasion, publicly taunts another in whose conduct he has no personal interest, with some old and generally forgotten immoral act or act of impropriety"; Lord Deas, Ordinary, in Friend *v.* Skelton, *supra* (First Division).

A defender of an action for defamation, who takes an issue in justification, requires to prove up to the innuendo; Harkes *v.* Mowat, 1862, 24 D., 701.

[1] Blaikie *v.* Duncan, 1857, 19 D., 984, 1095.

tion of damages, although he had not taken an issue of justification (*o*). The evidence was not admitted to prove the *veritas convicii*, but to shew the circumstances which provoked the slander, and which were therefore part of the *res gestae* (*p*).

§ 26. In other actions besides those laid on defamation, evidence against the character of the subject of the suit is admitted, where it throws light on the question in issue and on the amount of damages: and the same principle admits evidence of the bad character of the injured party in certain criminal cases. On this ground in actions of damages in England for seduction of the pursuer's daughter, and for criminal conversation with the pursuer's wife, their wanton or immodest character, and even particular instances of connection, may be proved (*q*), unless they occurred after those with the defender (*r*). In such cases (none of which are reported on these points in Scotland), the evidence is admissible, although the pursuer has not attempted to set up the character in question (*s*). In an action of assythment, the defender was allowed to prove his defence that the deceased had been subject to bad habits, and that, at the instigation of his family (some of whom were pursuers), he had lived separate from them, that he had not supported them, and had bestowed his savings on a woman with whom he carried on an adulterous intercourse; these facts being relevant on the question of damage (*t*).[4]

§ 27. In an action of damages for adultery with the pursuer's

(*o*) Ogilvy *v.* Scott, 1836, 14 S., 729, 1080; see this case noticed by the Lord Justice-Clerk (Hope) in M'Neill *v.* Rorison, 1847, 10 D., 33. (*p*) On this point see also White *v.* Cleugh, 1847, 10 D., 334—Holehouse *v.* Walker, 1853, 15 D., 665—Muller *v.* Robertson, 1853, 15 D., 661. (*q*) Coote *v.* Berty, 1698, 12 Mod., 232—Roberts *v.* Malston, Sel., N. P., 24—Elsam *v.* Faucett, 1799, 2 Esp., 562—Bamfield *v.* Massey, 1808, 1 Camp., 460—Bate *v.* Hill, 1828, 1 C. and P., 100—Carpenter *v.* Wahl, 1840, 3 Per. and Dav., 457—2 Starkie Ev., 305—1 Phil., 467—Taylor, 255—1 Greenleaf, 72—See also an unreported Scotch case noted in 1 Fraser, 676. (*r*) Elsam *v.* Faucett, *supra*, Sel., N. P., 25. (*s*) Authorities in note (*q*). (*t*) Brash *v.* Steele, 1845, 7 D., 539.

[4] In an action for reparation for bodily injuries which, the pursuer alleged, had incapacitated him for business, the defenders, without having impugned the pursuer's character on record, put questions to him and to some of his witnesses with a view to prove that he was of intemperate habits. The Lord Justice-Clerk (Inglis) held the line of examination to be competent. Lord Cowan doubted the propriety of allowing such evidence when there were no averments as to character on record. The line of defence was not followed out, and consequently the pursuer examined no witnesses on the subject. But he was allowed the expense of witnesses brought to speak to the point, had it been necessary; Butchart *v.* Dundee and Arbroath Railway Co., 1859, 22 D., 184.

wife, evidence of his loose conduct and character, during the marriage was admitted, as bearing on the damage which he had sustained from the acts complained of; but his general loose character, and his having been divorced from a former wife, were not allowed to be proved (*u*). Where in an action of damages by a schoolmaster for being turned out of his school, the defence was that he deserved dismissal, the defender was allowed to prove how the pursuer taught the school; but the Lord Chief Commissioner was inclined to prevent a general proof of his character (*x*).

§ 28. In an action of damages against officers of police for wrongous apprehension of the pursuer as a resetter, and improper treatment of her while in custody, where the defenders pleaded that they acted in discharge of their duty in consequence of the suspicious circumstances against her, and denied having treated her improperly, they were allowed to prove several previous complaints against her, with the procedure thereon, and a conviction in the police court, as these facts might have justly influenced them in detaining her in custody (*y*). In another action of a similar kind, where the defence was that the pursuer had been "furiously intoxicated," and had committed a breach of the peace, and where there was an issue whether the defender acted in the lawful execution of his duty, he was allowed to prove the pursuer's general behaviour in his family, and that he was a violent man, but not particular acts of violence (*z*). Thus also the defender in an action of damages for assault may prove that the pursuer is of a quarrelsome or fierce disposition, if that is averred on record as justifying or palliating the attack (*a*). As, however, the pursuer's character is not usually in issue in the cases in this section, the defender's record must give some notice of the line of proof, although it does not seem necessary that it should impugn the pursuer's general character for honesty or peacefulness as the case may be (*b*).

Thus also in trials for murder and stabbing, the prisoner may prove the general quarrelsome and violent temper of the person attacked (*c*), but not particular acts of violence on the prisoner at

(*u*) Baillie *v.* Bryson, 1818, 1 Mur., 330—See also Brodie *v.* Blair, 1834, 12 S., 941—1 Fraser, 676. (*x*) Miles *v.* Finlayson, 1829, 5 Mur., 86. (*y*) Nimmo *v.* Stewart, 1832, 10 S., 844. The extract conviction was received, although it did not bear that the witnesses had been sworn. (*z*) Jameson *v.* Main, 1830, 5 Mur., 130, 1. (*a*) Walker *v.* Ritchie, 1836, 14 S., 1128—Lang *v.* Lillie, 1826, 4 Mur., 16—Bannerman *v.* Fenwicks, 1817, 1 Mur., 252—(See this case noticed by Lord Pitmilly in Lang *v.* Little). (*b*) Compare cases in the three preceding notes with Hall *v.* Otto, 1818, 1 Mur., 444, and Macfarlane *v.* Young, 1824, 3 Mur., 412.

(*c*) Shiels, 1846, Arkley, 171—Irving, 1838, 2 Sw., 109.

a considerable interval (two months) before (*d*), or attacks upon third persons (*e*). Even general character for violence can only be proved when there is a special defence (*f*).

§ 29. The accused in a charge of rape, or assault with intent to ravish, may prove the woman's unchaste character, and even particular acts of criminality, both as circumstantial evidence to negative the charge, and as an alleviation of the crime (*g*). But the prosecutor must have notice of this line of evidence (*h*), unless he has attempted to set up the woman's character (*i*). There is some doubt whether the proof is limited to her conduct before the act libelled (*k*). It is true that the loss of virginity is apt to make a woman reckless of her virtue; but this seems rather to affect the weight of the subsequent evidence, than to be a ground for rejecting it; as proof of gross indecency might satisfy the jury that the woman is really of a lewd disposition, and might therefore negative the charge. It seems competent to prove that before the act libelled she had connection with other persons besides the prisoner (*l*), and that she was in the habit of associating with prostitutes (*m*). But an inquiry into the character for modesty of any individual of her companions will be excluded, unless perhaps in regard to one who is distinctly alleged to be a common prostitute (*n*).[6]

(*d*) Shiels, *supra*. (*e*) Irving, *supra*. (*f*) Brown, 1836, 1 Sw., 298.

(*g*) 1 Hume, 304—1 Al., 215—2 Al., 531—Allan, 1842, 1 Broun, 500—Blair, 1844, 2 Broun, 167—Tweedie, 1836, Bell's Notes, 84, 1 Sw., 22—Leitch, 1838, 2 Sw., 112.

(*h*) Hume, ib.—1 Al., 216—2 Al., 531—M'Millan, 1846, Arkley 209—Wight, 1836, 1 Sw., 49—Blair, *supra*. (*i*) Wilson, 1813, Hume, ib.—Al., ib.

(*k*) Leitch, 1838, 2 Sw., 112, Bell's Notes, 84. In Wilson's case (*supra*), evidence of the woman's subsequent conduct was received; but Baron Hume disapproves of the decision; 1 Hume, 304. It is incompetent in England; 1 Phil., 468—2 Starkie, 305.

(*l*) Blair, 1844, 2 Broun, 167—Stephens, 1839, 2 Sw., 348—Smith, 1805, Burnett, 462—2 Al., 531—*contra*, Allan, 1842, 1 Broun, 500. In one case where the prisoner put in a special defence, alleging that the woman was at the time, and continued to be, an immodest woman, and on the evening after the alleged injury had been found in bed with another man, Lord Medwyn allowed the latter fact to be proved, but only as bearing on the quality of the assault and extent of injury, and refused to allow proof of subsequent immorality; Leitch, *supra*. Only criminal acts with the prisoner are received in England; Hodgson's case, 1812, R. and R., 211—1 Phil., 468—2 Starkie, 305.[5] (*m*) Webster, 1847, Arkley, 269. (*n*) Webster, *supra*.

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[5] Taylor in his 3d Edition, vol. i, p. 332, note 3, says that Hodgson's case has been over-ruled. Best says that the question is open in England; Best on Evidence, § 260.

[6] In a trial for rape, although the immoral character of the principal witness may be proved without a special defence, due notice should be given to the prosecutor of the panel's intention to impeach her character.

In a recent trial for rape, the Court rejected evidence of the unchastity of the woman,

Secondly, As to the character of the defender:—

§ 30. In criminal prosecutions it is the constant practice to admit proof of the panel's good character, both as circumstantial evidence in his favour, and in mitigation of punishment. But the prosecutor is never permitted to attack the prisoner's character, unless the latter has set it up; and even then he very seldom goes beyond cross-examining the prisoner's witnesses on the point. The prosecutor, however, may prove that the panel has been previously convicted of the crime libelled, and in charges of theft that he is habit and repute a thief, provided the libel gives notice of these specific aggravations.[7] In principle, the admission of such evidence is not an exception to the general rule; and the Court frequently directs the jury to disregard it in determining upon the main charge. But in practice juries attach considerable weight to this kind of evidence as bearing on the whole case.[8] Where theft, aggra-

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some years before the date of the alleged crime, when there was no offer to prove continued unchastity up to the date of the crime. It was held that the rule, that, in rape, the chastity of the woman might be impeached, had this limitation, that the unchastity to be proved must be at or immediately before the date of the offence; if the panel proved her unchastity then, he could carry back his proof as far as he pleased. The Court indicated an opinion against the competency of evidence of acts of unchastity with other persons besides the prisoner, and the Lord Justice-Clerk (Inglis) said that his opinion was in conformity with that expressed by Lord Moncreiff in the case of Allan, referred to in note (*l*), which was against the competency of that kind of evidence; Lord Advocate *v.* Reid, 1861, 4 Irvine, 124—34 Jur., 108. It is understood, however, that such evidence is frequently led in practice; it was led without objection in the case of Francis Dignan, 1854, 1 Irvine, 357. When it is intended to lead such evidence in defence, distinct notice of the names of parties, places, and dates, ought to be given; Reid, *ut supra*—Lord Advocate *v.* Forbes, 1858, 3 Irvine, 186.

[7] The aggravation of habit and repute a thief is not established by proof that the panel had born that character for a year; Adv. *v.* M'Pherson, 1862, 4 Irv. It is not competent to prove that a panel is habit and repute a resetter. But it was held competent to inquire what was the character of the persons who frequented the panel's house; Burns *v.* Hart, 1856, 2 Irv., 571.

[8] An exception to the ordinary practice has been introduced by the late Act consolidating the Statute-Law against offences relating to the coin; it is provided by that Act (§ 34) that in the trial of an indictment for committing an offence after a previous conviction or convictions, the previous convictions shall not be taken into consideration until the panel has pleaded guilty to the subsequent offence, or been found guilty of it by verdict of the jury, that the prisoner shall then be asked whether he has been previously convicted as alleged in the indictment, and if he does not admit the previous conviction, the evidence of it shall then be laid before the jury; provided that if a panel, on his trial for a subsequent offence, offers evidence of his good character, the prosecutor may reply, by evidence of the conviction of the panel for the previous offence, and in that case the jury shall enquire concerning such previous conviction or convictions at the same time that they enquire concerning such subsequent offence; 24 and 25 Vict., c. 99, § 34.

vated by the panel being habit and repute a thief, and robbery are charged alternately, and the evidence in the opinion of the Court applies to robbery, the aggravation (which is limited to the charge of theft) may not be proved (*p*). The prisoner's evidence of character has often special reference to the individual offence; *e.g.*, in a charge of murder, his kindly behaviour towards the deceased, and his loyalty in a charge of treason or sedition. Sometimes even blemishes in the panel's character may be relevant evidence in his favour, as his cowardly or deceitful disposition in crimes shewing great boldness and daring,—his stupidity in crimes shewing ingenuity,—or, as in the trial of Burke for murder, where the fact of his having carried on a trade of body-lifting was dwelt upon by his counsel, Dean of Faculty (late Lord) Moncreiff, as accounting for his having dead bodies in his house under suspicious circumstances.

§ 31. In civil cases the defender's character is held not to be in issue: and therefore he may not prove that it is good, unless the pursuer has attacked it (*r*). This rule has been applied in actions of damages for defamation (*s*), and for illegal imprisonment (*t*). Even in cases directly involving the defender's character, the proof has been excluded, as in actions laid on fraud (*u*), and embezzlement (*x*). But in these cases there seems to be no good reason for depriving the defender of such circumstantial evidence: which would have been admitted if the same charge had been made against him in a criminal Court (*y*).

§ 32. The defender's character may not be attacked by the pursuer, as by proving his dissipated habits in an action by a master against his apprentice for deserting his service (*z*); or his quarrelsome disposition in an action of damages for assault (*a*).

§ 33. When evidence of character is competent, the general rule

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(*p*) M'Callum, 1836, 1 Sw., 64. (*r*) Macf. Pr., 218. In Hyalop *v.* Miller, 1816, 1 Mur., 49, where the defender in an action of defamation pleaded *compensatio injuriarum* in consequence of the pursuer having called him a disgraced officer, he was allowed proof of his good character in order to rebut that charge. (*s*) Scott *v.* M'Gavin, 1821, 2 Mur., 493—Cooper *v.* Mackintosh, 1823, 3 Mur., 359—In Armstrong *v.* Vair, 1823, 3 Mur., 317, where such evidence was led without objection, the Court did not interfere, but remarked that the case would not be a precedent. (*t*) Simpson *v.* Liddle, 1821, 2 Mur., 580. (*u*) Clark *v.* Spence, 1825, 3 Mur., 474—1 Phil., 467—Taylor, 253—Goodright, 1789, Bull., N. P., 296—Att.-Gen. *v.* Bowman, 1791, 2 B. and P., 532, note. (*x*) Kitchen *v.* Fisher, 1821, 2 Mur., 591. (*y*) The decisions referred to are opposed in principle to those noticed above, § 23, (*s*), (*x*).

(*z*) Gunn *v.* Goodalls, 1835, 13 S., 1142. (*a*) Haddoway *v.* Goddart, 1816, 1 Mur., 151. Here the defender had tried to set up his character by cross-examining the pursuer's witnesses.

admits evidence only of general character, not of particular facts; because one will seldom be at a loss to meet a false attack upon his general character, whereas he might be taken by surprise in having to disprove special charges (*b*).[9]

CHAPTER III.—RELEVANCY OF EVIDENCE IN QUESTIONS OF KNOWLEDGE, INTENTION, AND MALICE.

§ 34. The knowledge, intention, or malice of a person, can often be gathered only from a number of circumstances not individually important; and therefore, when the issue involves such facts, evidence is received which in other cases would be held irrelevant (*c*). Thus in an issue whether the defender falsely stated to certain officials that the pursuer had uttered a forged bank note, knowing it to be forged, where the defender took an issue of probable cause, he was allowed in evidence of the pursuer's guilty knowledge to prove that warning had been given him by the bank with regard to other forged notes (*d*). Certain instances of the defender having slandered the pursuer being in issue, other instances of similar slander not set forth may be proved, as indicating the *animus* with which those in issue were uttered (*e*).[1] But this

(*b*) Bannerman *v.* Fenwicks, 1817, 1 Mur., 252—Cleland *v.* Mack, 1829, 5 Mur., 72—Denham *v.* Ogilvie, 1827, 4 Mur., 196—Baillie *v.* Bryson, 1818, 1 Mur., 323—Sheils, 1846, Arkl., 171—Irving, 1838, 2 Swin., 109—1 Greenl., 76—Taylor, 258—2 Starkie, 304, 305. But in an action of damages against a coach proprietor for an overturn, proof that the driver was rash was rejected, while facts showing him to be rash were held admissible; Gunn *v.* Gardner, 1820, 2 Mur., 196. And in an action of damages against a jailor for violence to the defender when in his custody, the pursuer's quarrelsome disposition was not permitted to be proved, and the Lord Chief Commissioner (Adam) remarked, "to prove his disposition you must shew particular acts of violence," but on this evidence being tendered, it was rejected on the ground of surprise and want of notice; Macfarlane *v.* Young, 1824, 3 Mur., 412—See also *supra*, § 27, (*u*), (*x*).

(*c*) See per Lord Jeffrey in Hastie *v.* Warden, 1848, 11 D., 240. (*d*) Gibsons *v.* Marr, 1823, 3 Mur., 259. (*e*) Forbes *v.* Kirk, 1841, 4 D., 1177.

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[9] In an action of damages against a railway company for injuries sustained in an excursion train, the degree of *culpa* is proper for the consideration of the jury in assessing damages; Dobie *v.* Aberdeen Railway Co., 1856, 18 D., 862.

[1] In Friend *v.* Skelton, 1855, 17 D., 548, Lord Deas observed (558)—"I wish to make it quite clear that I give no opinion on the question—nor do I understand your Lordship in the chair to have done so—whether, when it is set forth generally that the slander uttered on an occasion specially libelled had been repeated at another time, and

was not allowed as to expressions which had been the subject of a separate issue that had been abandoned on account of error in the locus (*f*). And where there were special issues of separate slanders in presence of certain individuals, proof of similar slanders to other persons was rejected (*g*), the Court remarking that the proof would have been allowed if there had been a general issue (*h*).[2] In an action of damages on account of the defender having fraudulently executed a mercantile order, in the knowledge that it had been intended for the pursuer, the Court rejected evidence that the defender had several years before executed similar orders improperly, the object in tendering the proof being to shew that he knew that the order in issue was meant for the pursuer (*i*). But this decision may be questioned. In an issue whether A knew that a certain assignation had been granted, proof of the knowledge of his agent B is relevant, although not conclusive (*k*).[3]

§ 35. The same principle applies in criminal cases. Thus in a trial for reset, it is a relevant circumstance that the panel had been previously indicted for resetting goods from the same thieves from whom he was charged with receiving those libelled on (*l*).[4] In pro-

(*f*) Forbes *v.* Kirk, 1841, 4 D., 1177. (*g*) Cullen *v.* Ewing, 1832, 10 S., 497, 748—Craig *v.* Marjoribanks, 1828, 3 Mur., 344. (*h*) In Cullen *v.* Ewing, ibid.

(*i*) Dickson *v.* Dickson and Co., 1830, 5 Mur., 228, and 8 S., 938. See this case noticed *supra*, § 18. (*k*) Balfour *v.* Lyle, 1832, 10 S., 853; 11 S., 906.

(*l*) William Campbell, Aberdeen Autumn Circuit, 1847, per Lord Mackenzie, not reported. See also 1 Hume, 114, 115.

on other occasions, such repetition of the slander may or may not be competently proved as indicating the *animus*. When such a question arises, it will be proper to attend to the case of Forbes *v.* Kirk, and to some other cases which have occurred in practice, although perhaps not reported."

[2] Where in reference to two alleged acts of slander the defender established the *veritas*, proof of them was held not to aid the proof of a third act of slander, which being deponed to by one witness only, was held not sufficiently established. The proof in the case had been taken in the Sheriff Court; Wilson *v.* Weir and Strang, 1861, 24 D., 67.

[3] Evidence of the malice of an agent will not prove the malice of his client, unless it be shewn that the agent, in acting maliciously, was carrying out the wishes or representing the feelings of his client; Mackellar *v.* Duke of Sutherland, 1862, 24 D., 1124.

Evidence of a general belief in the neighbourhood where a person resided, that he was insane, held inadmissible to prove that a party who transacted with him knew of the insanity; Greenslade *v.* Dane, 1855, 20 Beavan, 284.

[4] But see Burns *v.* Hart, *supra*, § 80, note 7. Baron Hume (vol. i, p. 114), referred to in note (*l*), says, in reference to the circumstances proving guilty knowledge by a resetter—"Of all these it is a powerful confirmation if the panel or his author is a reputed thief or resetter." On this passage the Lord Justice-Clerk (Hope) observed that it had "been reprobated for the last forty years;" Burns *v.* Hart, *supra*.

secutions under the Coining Acts, the previous convictions for the same offence are relevant evidence for the jury in considering the point of guilty knowledge; but their weight will be impaired by a considerable time having elapsed since their dates (*m*).[5] They must always be libelled on.

§ 36. In a charge of forgery and uttering, it is material evidence of the panel's guilty knowledge, that other forged notes have been found on his person (*n*), or that he had previously made unsuccessful attempts at uttering the notes (*o*). But such attempts must be libelled on (*p*). In a charge of murder, previous expressions of malice, or acts indicating that disposition, towards the deceased are relevant; but in order to prevent surprise, the proof is restricted to expressions or conduct which occurred shortly before the alleged crime, unless the indictment libels previous malice (*r*).[6] The prosecutor may, however, prove malice without libelling it, if the panel gives in a special defence of want of malice (*s*). Where the prisoner is indicted for certain seditious expressions at a public meeting, other expressions in the same speech may be proved, although not libelled on, in order to shew the *animus* of the speaker (*t*). But it is not settled whether words spoken at another meeting not libelled on, held at the same time and for the same objects as the one libelled on, can be proved for that purpose, without being

(*m*) Sutherland and Gibson, 1848, 1 Jn. Shaw, 135. (*n*) See 1 Al., 419.

(*o*) 1 Hume, 157, note—1 Al., 416. The same remark is frequently made in cases of uttering base coin; see 1 Al., 455. (*p*) Hume, ibid—1 Al., 417. (*r*) See this illustrated in 1 Hume, 257, and 1 Al., 11. In one case where the prosecutor had not libelled previous malice, he was restricted to a fortnight before the date of the murder; Divine, 16th June 1824 (High Court), noticed Al., *supra*. In Millar, 1837, 1 Sw., 486, the Court admitted evidence of threats shewing malice six weeks before the murder, but only on the prosecutor stating that he would by other evidence bring the malice (which was not libelled on) down to within a fortnight of the crime.

(*s*) Wright, 1835, 1 Sw., 6. (*t*) Grant and Others, 1848, J. Shaw, 54.

[5] But see form of procedure in indictments under the Coinage Acts, according to which the substantive offence charged must be disposed of before the previous convictions are proved; 24 and 25 Vict., c. 29, § 84—See *ante*, § 30, note 8.

[6] In a trial for murder where malice was libelled, evidence of malice six or eight weeks before the death was admitted; Lord Advocate *v.* Salt, 1860, 3 Irv., 549.

In a trial for murder of a woman, proof that the prisoner had within twenty-four hours after the woman's death used expressions indicating malice toward her was admitted; also proof that on the second day after the alleged murder, a person, since deceased, had complained of the conduct of the prisoner to the murdered woman; Advocate *v.* Stewart, 1855, 2 Irv., 179.

narrated in the indictment (u). A letter written on 30th April 1845 is not admissible evidence of a conspiracy libelled as having commenced in March 1845; the interval being too great to indicate continuity of criminal intent (v).

§ 37. In England also, collateral facts are admissible in order to shew knowledge, malice, or intention (w). Thus, in an action by the indorsee upon a bill where the defendant proved that the payee's name was fictitious, and the plaintiff thereupon alleged that the defendant knew it was so, or had given authority to the drawer so to draw the bill, evidence of suspicious circumstances regarding other bills accepted by the defendant, but not relating to the one in question, was admitted in order to prove the allegation (x). "In actions of defamation other words written or spoken by the defendant, either before or after those declared upon, after issue joined, are under the general issue admissible as proof of actual malice, or deliberate intention; and for this purpose it makes no difference whether the language on which the action is founded be equivocal or clear, whether the collateral words tendered in evidence be addressed to the same party to whom the slander is alleged in the declaration to have been spoken, or to a stranger, or whether these words be in themselves actionable or not" (a). But the collateral libel will only be received if it refers directly to the one in issue, or relates to the same subject matter, as by repetition of the same slander, or by use of other words which shew the same train of thought, thereby indicating a continuity of rankling malice on the part of the defendant (b). If it shews an *animus* of a different slander it will be rejected (c). It will also be excluded if the evident object in tendering it is unfairly to recover damages for publishing it, and not to shew the defender's *animus* in the libel in issue (d). In an action of damages in England for false imprisonment, where the defendant pleaded not guilty, and a justification in respect of the plaintiff having committed a felony, and where the latter plea was abandoned and apologised for at the trial, the fact of

(u) Grant and Others, *supra*. This evidence being offered and objected to on the ground of surprise and want of libelling, the Crown counsel waived the question; but the Court observed that "it must not be considered as a ruling by them that language intimating an intention of conspiracy could not be proved, though the specific occasion on which it was used was not stated in the libel;" per Lord Justice-Clerk Hope.

(x) Grant and others, 1848, J. Shaw, 54. (y) 2 Starkie Ev., 313—1 Phil., 461—Taylor, 246—1 Greenl., 71—See also Du Bost v. Beresford, 1810, 2 Camp., 511, *infra*, § 88. (z) Hunter v. Gibson, 1804, 2 H. Black, 288. (a) Taylor, 246.

(b) Finnerty v. Tipper, 1809, 2 Camp., 72, per Lord Mansfield. (c) Finnerty v. Tipper, *supra*. (d) Stuart v. Lovell, 1817, 2 Starkie R., 95—Taylor, 248.

the justification was held relevant matter for the jury in estimating the damages, because it was evidence of malice, and a great aggravation of the defendant's conduct, as showing an *animus* of persevering in the charge to the very last (*e*).

§ 38. The same principle holds in criminal cases in England (*f*). Thus in an indictment for knowingly uttering a forged bank-note, proof that the prisoner had shortly before uttered another forged note of the same manufacture, and that a number of these were in circulation at the time, is admitted to shew his guilty knowledge, although the indictment is silent upon them (*g*). And where the prisoners were charged with having conspired to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, proof of other instances of false representation by them was received (*h*). On the same principle in trials for treason, seditious language uttered by the prisoner at other times regarding the conspiracy charged (*i*), or an "overt act not laid, may be given in evidence, if it be a direct proof of any of the overt acts laid:" and this is competent although the acts not libelled on were committed in a foreign country (*k*).[7]

§ 39. It appears from these illustrations that the English practice is rather more liberal than ours in receiving collateral facts in questions of knowledge and intention. This difference, and the great dissimilarity between the forms of pleading in the two countries, render some caution necessary in applying the English decisions to Scotch cases (*l*).

(*e*) Per Lord Abinger in Warwick *v.* Foulkes, 1844, 12 M. and W., 507.

(*f*) 1 Phil., 472—Taylor, 249. (*g*) R. *v.* Ball, 1808, 1 Camp., 324—R. *v.* Wylie, 1804, 1 Bos. and Pul. New R., 92. (*h*) R. *v.* Roberts, 1808, 1 Camp., 399.

(*i*) R. *v.* Watson, 1817, 2 Starkie R., 134—1 Phil., 470—See also R. *v.* Hunt, 1820, 3 Bar. and Al., 572—Layer's case, 1722, 16 State Tr., 164. (*k*) Foster, 10—Deacon's case, 1746, 9 State Tr. (fo. ed.), 558—Layer's case, 1722, 16 State Tr., 221—1 Phil., 470. (*l*) In regard to criminal cases, the English doctrine of "Election" must be kept in view. In this country it is competent, and is the practice, to include in one indictment any number of separate offences of any degree of malignity, and only where trying all of them at once would interfere with the justice of the case, does the Court direct a separation of the trials; 2 Hume, 173—Burke's Trial, 1828, Sep. Rep. A separation, however, is very rarely required in practice. But in England the indictment is framed in this way only in misdemeanours. In felonies the practice so to indict "has from motives of humanity been considerably modified; for as an indictment containing several distinct charges is calculated to embarrass a prisoner in his defence,

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[7] At a trial in England for obtaining money on false pretences, evidence that the panel had within a week of the time charged in the libel obtained money on similar false pretences was not admitted; Reg. *v.* Holt, 1860, 8 Cox, Cr. Cas., 411.

CHAPTER IV.—OF ADMITTING COLLATERAL FACTS TO DISCREDIT AN OPPONENT'S WITNESSES.

§ 40. It is incompetent to enter into an irrelevant inquiry for the purpose of discrediting an opponent's witness or testing his accuracy (*m*).[1] But some license in this respect is allowed in examining witnesses to matters of opinion in science or the like; as their evidence can generally be tested only by inquiring into the data for their propositions, and by examining them upon analogous and often hypothetical cases (*n*).

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the judges in the exercise of a sound discretion are accustomed to quash indictments so framed, whenever it appears, before the jury are charged, that the inquiry is to include separate crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact parts of one continuous transaction;" Taylor, 242. (*m*) Thus in Innes *v.* Innes, 1837, 2 Sh. and M'L., 417, affirming 13 S., 1059, where a party against whom a witness was adduced attempted to prove that she had falsely represented herself to be the wife of a certain person who had no concern with the cause, the evidence was held incompetent both in the Court of Session and House of Lords, the Lord Chancellor Lyndhurst observing, "there would be no end of proceedings if the entering into such collateral issues were permitted." So in Tennant *v.* Hamilton, 1839, M'L. and Rob., 821, per Chancellor Cottenham—Whealler *v.* Methuen, 1843, 5 D., 1221—1 Starkie Ev., 189, 603—2 Starkie Ev., 313. Of course this does not apply to matters directly impugning the witness's credibility, as malice, previous conviction of a crime, and the like. See the chapter on the Credibility of Witnesses, *infra*. (*n*) This is the constant practice in cross-examining scientific witnesses. In questions of forgery, specimens of the handwriting of the same individual, although quite unconnected with the writing in issue, may be shewn to the witnesses to test their accuracy, as in Bryson *v.* Crawford, 1834, 12 S., 937—Rose *v.* Millar, 1831, 10 S., 95—See also Folkes *v.* Chadd, 1782, 3 Doug., 157.

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[1] It is incompetent to examine a witness on matters not connected with the subject of the issue or libel, with the view, if her evidence should be false, of damaging her credibility; ruled in a trial for rape; Lord Advocate *v.* Reid and Others, 1861, 4 Irv., 124. A witness for a prisoner said that he could not speak English, and accordingly gave his evidence in Irish. In cross-examination, he was asked if he had not spoken in English to two persons in Court, and on his answer in the negative, the Crown proposed to contradict him by examining these persons. The Irish Court of Criminal Appeal held that the evidence ought to be rejected as raising a collateral issue; Reg. *v.* Burke, 1858, 8 Cox, Crim. Cas., 44.

TITLE III.

OF PROVING THE ISSUE AND LIBEL.

Having thus considered the rules as to the relevancy of different items of evidence, we proceed to treat of the application of the whole proof to the libel and issue in the cause. As preliminary to this inquiry, a few observations on the general nature of the issue and verdict will be necessary.[1]

CHAPTER I.—OF THE LIBEL AND ISSUE.

§ 41. Jury trials in the Court of Session are conducted, and the verdicts in them are returned, with reference to "issues;" which are queries putting to the jury categorically the points they have to decide (*a*). The issues are prepared by the parties by whom they are respectively required; and are adjusted between the parties with the aid of the Court (*b*). When so adjusted, they are settled as the issues in the cause, and contain the only questions which the jury have to determine. In the earlier jury cases every material fact on which the parties differed was put in issue articulately (*c*). But this practice was discontinued on account of its inconvenience. For a number of years the issue, while fairly bringing out the facts

(*a*) Lord Cockburn thinks it would be a great improvement to abolish issues; Graham v. M'Lachlan, 1853, 15 D., 901. (*b*) 13 and 14 Vict., c. 36, § 38. (*c*) M'F. on Issues, 6.

[1] The present practice of the Court is, in most cases, to send a case to trial on issues without any previous judgment on the relevancy of the pursuer's case, leaving questions of law and relevancy for determination by the judge at the trial.

on which the litigation turns, has done so in a general and comprehensive manner (*d*).[2]

§ 42. In criminal cases, and in proofs on commission in civil causes, the proof is adduced with reference to the libel itself without an issue.[4] But issues are required when a case fitted for a jury is, by consent of parties, tried by the Lord Ordinary without a jury, under the recent Court of Session Act (*e*).[5] When the Lord Ordinary tries in this way (either with or without consent) questions of fact which should be investigated without a jury trial or proof on

(*d*) This practice was introduced by Lord Chancellor Eldon, directing one general issue to be laid before the jury in the second trial of the Earl of Fife's case, in place of the seven special issues on which the case had been tried before; E. Fife *v.* E. Fife's Trustees, 1828, 1 Sh. Ap., 498. In actions of damages for defamation, each slander is still put separately in issue; see Lady Ramsay *v.* Nairne, 1833, 11 S., 1033.[3] (*e*) 13 and 14 Vict., c. 36, § 46.

[2] What is to be put in issue is the ground of action, from which is derived the inference that forms the conclusion of the summons; therefore what is called an issue of resting owing, is not properly an issue at all, being extracted from the conclusions instead of the condescendence and pleas in law, where only the grounds of action are found; *per* Lord Justice-Clerk, United Mutual Mining and General Assurance Co. *v.* Murray, 1860, 28 D., 69, 72.

When parties adjust issues to try the cause, and when these issues are approved of by the Court as the issues for trying the cause, they will be held to embrace the whole grounds of action on which the parties mean to insist, and to imply a departure from, and abandonment of, every ground of action embraced by the summons that is not embodied in the issues. Thus where, in an action of declarator of five different rights of way, issues to try the cause, were adjusted and approved, which referred to two of the paths only, there was held to be a virtual abandonment of the cause as regarded the other three paths, and the Court would not permit the pursuers at a later stage of the cause, to abandon the action *quoad* these three roads, reserving their right to bring a new action, under the Act 6 Geo. IV, c. 120, and Act of Sederunt, 11th July 1828, but assoilzied the defender; Hay *v.* Earl of Morton, 1862, 240 B. M., 1054.

[3] In an action of damages for defamation where the first issue states precisely an act of defamation, and the time when, place where, and persons before whom, it was uttered, the pursuer may in his second issue put to the jury whether the defender did not say the same thing repeatedly, without putting in the issue the days or places of such repeated statements; Innes *v.* Swanston, 1857, 20 D., 250.

[4] The general rule is, that whenever matter of fact is in dispute, the case should go to a jury, and the Court will not grant proof on commission except on special cause shown. Where both parties wished a proof by commission as to an alleged practice of trade, the Second Division refused to grant commission, and directed the parties to prepare issues; Cameron *v.* Kerr, 1861, 28 D., 1257.

[5] In Hood *v.* Williamson, 1861, 28 D., 496, the Lord Justice-Clerk observed that cases likely to result in special verdicts were proper for trial by the Lord Ordinary without a jury, and the provision of the statute was intended to provide for such cases; but ordinary jury questions should go to a jury.

commission, there is no issue, but the Lord Ordinary fixes the question on which the proof is to be adduced (*f*).[6]

§ 43. The issues, when unambiguous and articulate, must be construed as they stand; so that, although they put to the jury a wider, a narrower, or even a different point from that which is brought out in the record, their true construction by themselves determines their meaning (*g*).

§ 44. On the other hand, if the issue is ambiguous, the record may be used for the purpose of explicating it (*h*). This must always be done in trials under a general issue; which is framed upon the footing of the record being referred to for the specific grounds of action and defence (*i*).[7]

(*f*) 13 and 14 Vict., c. 36, § 48. (*g*) Leys, Masson & Co. *v.* Lord Forbes, 1831, 5 W. S., 384, affirming 9 S., 933. In this case Lord Chancellor Brougham observed, the officer who framed the issue "may have miscarried as much as you please; he may have put one fact in issue when there was another fact to be put in issue; he may have made the grossest blunder; but you are bound by the issue he has framed as it now stands." See also E. Fife *v.* E. Fife's Trustees, 1816, 1 Mur., 137—Bertrams *v.* Barry, 1818, 1 Mur., 347—Berry *v.* Wilson, 1841, 4 D., 139—Cuthbertson *v.* Young, 1851, 14 D., 301. In a recent trial, however, under an issue whether a bankrupt had been concerned in the giving of a sum to a creditor as a consideration for "concurring in facilitating or obtaining" his discharge, the presiding judge observed, that nothing could be established under the words "facilitating or obtaining," as these were not in the record, or in the section of the statute founded on; and the trial accordingly proceeded on that footing; Inglis *v.* Gardner, 1843, 5 D., 1029, per Lord Justice-Clerk Hope. (*h*) Bertrams *v.* Barry, 1818, 1 Mur., 347—Leven *v.* Young, 1818, 1 Mur., 355—Scruton *v.* Catto, 1822, 3 Mur. 61—See also per Lord Justice-Clerk Hope in Berry *v.* Wilson, 1841, 4 D., 139. (*i*) See Macf. on Issues, 9—Cowan *v.* Watt, 1833, 11 S., 999.

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[6] The Lord Ordinary may competently under this provision fix for proof questions exhaustive of the cause; Ranken *v.* Drew, 1855, 17 D., 363.

[7] On this point the opinions recently expressed in the House of Lords are at variance with the practice in the Court of Session. In the Househill Co. *v.* Neilson, 1843, 2 Bell's Ap., 24, Lord Campbell mentioned with much commendation, the practice in the Courts in Scotland, of controlling the proof to be led under a general issue by the averments in the record, and stated that the House highly approved of, and would most carefully guard that practice; and the judgment of the House proceeded on a recognition of that practice. There has been no subsequent decision in the House of Lords inconsistent with these views. But in Morgan *v.* Morris, 1855, 27 Jur., 606, the Lord Chancellor (Cranworth) and Lord Brougham expressed an opinion that, after the issue was settled, the record could not be looked to, and the case of Neilson was spoken of as a special case, because it was a patent case. When the case of Morgan *v.* Morris came again before the House of Lords, in 1858, 8 Macq., 339, Lord Chancellor Chelmsford said, "It is most important always to bear in mind that the question to be tried is involved in the issues, and in these alone, and that you are not at liberty to go out of them for the purpose either of limiting the inquiry or defining with more particularity the points to be

§ 45. Although after the issues have been fixed they cannot be altered except of consent (*j*); yet an accidental error or miscopy may be corrected at the instance of either party, although the other objects (*k*).[8] And in allowing a new trial the Court may direct it to be on a different issue, which they consider better calculated than the former one to meet the justice of the case (*l*).

§ 46. The interlocutor of relevancy in a criminal case corresponds to the approval by the Court of the issue. It ties down the prosecutor to evidence in support of the libel as found relevant, and it excludes the prisoner from denying that the acts charged against him are criminal. Accordingly, in a trial for publishing blasphemous works, in which the truth of the Bible was denied, the usual interlocutor of relevancy having been pronounced, the Court prevented the prisoner (who defended himself), from pleading to the jury that the Bible deserved the aspersions he had cast upon it (*m*).

(*j*) Cochran *v.* Wallace, 1820, 2 Mur., 296. (*k*) M'Neill *v.* Caldwell, 1853, 15 D., 590—Cooper *v.* Mackintosh, 1823, 3 Mur., 358—Dunlop *v.* Buchanan 1828, 5 Mur., 17—Macf. Pr., 75—See also Inglis *v.* Gardner, 1843, 5 D., 1029, per Lord Justice-Clerk Hope. In Edwards *v.* Begbie, 1850, 13 D., 227, where the schedule of damages had been omitted in engrossing the issue, the Court allowed it to be added on a motion made after notice of trial had been given. (*l*) E. Fife *v.* E. Fife's Trustees, 1823, 1 Sh. Ap., 493—Inglis *v.* Great Northern Rail. Co., 1851, 1 Macq., 112. (*m*) Paterson, 1843, 1 Broun, 629—See also Letters *v.* Black, 1848, Arkl., 497.

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determined by the jury." The same views were expressed in the House of Lords in the case of Bryden, 1855, 2 Macq., p. 34, and in the very recent case of Robertson *v.* Fleming, 1861, 33 Jur., 691, 698. On the other hand, it has, on several occasions, been very distinctly announced from the bench in Scotland that this doctrine is "opposed to the whole course of our practice, and to the principle and purpose of our system of closed records;" *per* Lord President in Keir *v.* Magistrates of Stirling, 1858, 21 D., 171. See also Fairley *v.* O'Halleran and Brown, 1855, 18 D., 78—Christie *v.* Thomson, 1859, 21 D., 348, *per* Lord Deas—MacGillivray *v.* Soutar, 1860, 23 D., 212, 215. There has been no change in the practice of our Courts on this point, and records are still before the presiding judge at jury trial for general reference, and are used for the purpose of controlling and limiting the proof.

[8] Where a tenant stated in his record and issue that certain operations by his landlord, of which he complained, were made "about the month of April 1850," the Court refused to allow him to correct the record and issue by substituting for that date, "the spring of 1851;" Hill *v.* Kinloch, 1855, 17 D., 958. But where it was put in an adjusted counter-issue whether the pursuer of an action for defamation had committed fornication "in the house No. 5 Brown Street," the issue was amended by striking out "No. 5," and adding the word "Lane" after Street, there being no No. 5 either in Brown Street or Brown Street Lane, and Brown Street Lane being the place mentioned in the condescendence; A. B. *v.* Skae, 1857, 19 D., 958. The Court allowed an alteration on a closed record, before issues were adjusted, of the alleged date of the defamation, which was the subject of the action, the error being a mere inadvertency, and the record itself affording the means of correcting it; Bayne *v.* Macgregor, 1862, 24 D., 1126—Mrs Blaikie *v.* Duncan, 1857, 19 D., 1095.

CHAPTER II.—OF THE VERDICT.

§ 47. In civil trials the verdict is delivered in Court orally by the chancellor of the jury; and, after being committed to writing by the clerk, is read aloud to the jury, in order that any error in taking it down may be corrected.[1] In criminal trials the verdict used to be delivered to the judge in writing and sealed up. The judge then opened the enclosure, read the verdict, and delivered it to the clerk of Court, by whom it was engrossed verbatim in the record: and the original and record-copy having been compared, the verdict as recorded was read aloud by the clerk in presence of the jury (*n*). But this practice was the source of many technical objections, which materially interfered with justice; and therefore oral verdicts were introduced by statute (*o*). They are now used almost invariably; for even where the verdict is committed to writing by the jury for the sake of accuracy, it is read by their chancellor as an oral verdict. The verdict on being announced by the chancellor is written down by the clerk, and read over to the jury as in civil cases. The advantage of this practice is, that if the verdict is ambiguous, or does not meet the issue or libel, the judge may call the attention of the jury to the circumstance, and may re-inclose them, and even decline to receive the verdict until it has been corrected (*p*). The written verdict, on the other hand, must be copied into the record with all its imperfections, and cannot be altered or explained by the jury after they have assented to it in Court (*r*). But as the object of reading it over to them is to secure their assent, they may repudiate it in Court at the time; otherwise the chancellor and clerk might concert and record a false verdict (*s*). For this reason, also, a written verdict would be ineffectual, if it was

(*n*) 2 Hume, 428—2 Al., 637. (*o*) 54 Geo. III, c. 67—6 Geo. IV, c. 22, § 20—9 Geo. IV, c. 29, § 15. The last of these Acts abolished the written verdict in all cases where it is returned before the Court adjourns. (*p*) Adam on Jur. Tr., 235—2 Al., 637, and cases there cited—Wilsons, 1826, Syme, 43—Hunter and Others, 1838, 2 Sw., 15, per Lord Justice-Clerk Boyle—Brodie *v.* Johnston, 1845, 2 Broun, 559, per Lord Cockburn—Grant and Others, 1848, J. Shaw, 61. (*r*) 2 Hume, 429—2 Al., 642. (*s*) Ibid.

[1] If in a trial of civil causes, after three hours deliberation, nine or more of the jury shall agree, a verdict may be returned. If after six hours deliberation nine of the jury have not agreed on a verdict, the jury may be discharged; 22 and 23 Vict., c. 7.

"Not Proven" is a competent verdict in civil causes; Morgan *v.* Morris, 1855, 2 Macqueen, 342, 350. It is the usual deliverance in the ecclesiastical Courts of Scotland, when a person accused is assoilzied on the proof.

handed privately to the judge and not read over and assented to by the jury in Court (*t*). The general rule against explaining the written verdict by questions put to the jury was somewhat overlooked in a case where the prisoner was incorrectly designed, and the Court asked the jury if the verdict referred to him; and on their answering that it did, pronounced sentence accordingly (*u*); and in another case where the verdict mentioned the libel as an indictment, and the Court asked the jury if it meant the criminal letters on which the prisoner had been tried (*x*). But in both of these cases the meaning of the verdict was manifest without the explanation. In a previous case the Court asked the chancellor of the jury what they meant by the ambiguous written verdict of "guilty, but not to the extent libelled." Baron Hume, however, states good grounds for questioning that decision (*y*).

§ 48. When the verdict has been engrossed in the way above mentioned, it becomes part of the records of Court, subject to the general rule as to such writings, by which it is probative and conclusive proof of what the jury meant to find (*z*). Accordingly it may not be contradicted by showing that the jury, although allowing it to be recorded as their verdict, were concussed into emitting it, or that they did not really consent to it by a majority, or unanimously, where that is necessary (*a*), or by proving that they understood that mitigated findings, which it contained, would have exempted the prisoner from capital punishment, which they intended their verdict to do (*b*). Nor may a recommendation to mercy be added to the recorded verdict (*c*). On the same principle, in interpreting the verdict it is incompetent to receive evidence of what the jury intended to find (*d*), or (with the exception aftermentioned) to look at the evidence on the trial, even although the verdict is ambiguous (*e*), or self-contradictory (*f*).[2] It may, however, be im-

(*t*) On this ground the verdict in a trial before a Sheriff under a special statute was overturned; Forbes *v.* Mag. of Aberdeen, 11th Feb. 1809, F.C. (*u*) Alexander, 1823, 2 Al., 642. (*x*) Campbell, 1823, 2 Al., 642. (*y*) D. Grant, 1818, 2 Hume, 426. (*z*) 2 Hume, 426, *et seq.*—Adam on Ju. Tr., 235—2 Al., 640, 642.

(*a*) 2 Hume, 427—Mill *v.* Nicol, 1767, Maclaurin, 872—Mackintosh *v.* Fraser, 1834, 12 S., 872—See also Forbes *v.* Mag. of Aberdeen, 11th Feb. 1809, F.C. (*b*) Macgregor, 1752, Maclaurin, 149. (*c*) Darling, 1830, Bell's Notes, 295. But the Court intimated that they would pay regard to the recommendation in fixing the punishment. (*d*) Macgregor, *supra*—Adam on Jur. Tr., 232—R. *v.* Woodfall, 1770, 5 Burr., 2661. (*e*) Speir *v.* Dunlop, 1825, 4 S., 92—Walker *v.* Steele, ib., 328—Berry *v.* Wilson, 1841, 4 D., 139—Adam on Jur. Tr., 235. (*f*) Hunter, 1838, 2 Sw., 1.

[2] "In the case of a verdict which is ambiguous, imperfect, or inconsistent, its effect is

pugned on grounds which strike at its essential justice,—as that the jury were tampered with and misconducted themselves grossly (*g*), that they cast lots for the verdict (*h*), or that it was returned to the judge privately, without being read over to the jury in Court, and without their consenting to it (*i*).[4]

(*g*) M'Whir *v.* Maxwell, 1836, 15 S., 299—See Black *v.* Croall, Jan. 1854, *in pendente.*[3] (*h*) Stewart *v.* Fraser, 1830, 5 Mur., 166—Adam, Jur. Tr., Appx., No. 14. But it was held that the jury are inadmissible to prove such an allegation; Stewart *v.* Fraser, and M'Whir *v.* Maxwell, *supra.* This point is considered afterwards in treating of the admissibility of the judge and jury as witnesses. (*i*) Forbes *v.* Mag. of Aberdeen, 11th Feb. 1809, F.C.

to be derived, and only to be derived, from the terms in which it is expressed. It is a written document submitted to the legal consideration of a Court, and always to be construed by the legal wisdom and faculties of the Court; the Court alone is the tribunal which must say whether the verdict is ambiguous, &c., or not. If it is not ambiguous, &c., it must be applied, and judgment must proceed upon it. If the Court is of opinion that it is ambiguous, the ambiguity, &c., cannot be remedied by the Court changing the expressions of the verdict; as in that case the Court would encroach on the province of the jury. The only redress which they can administer is ordering a new trial"; Adam on Jury Trial, p. 295, quoted and adopted by the Lord Chancellor (Chelmsford) in Morgan *v.* Morris, 1858, 3 Macqueen, p. 337.

[3] 16 D., 431. A new trial was granted on the ground of inadequacy of the damages awarded, but nothing is said in the report about the conduct of the jury.

[4] In the late case of Dobbie *v.* Johnston and Russell, 1861, 23 D., 1139, where the jury returned a verdict which they intended as a verdict for the pursuer, but which was held to be clearly for the defender, the law of verdicts was carefully considered. In answer to an issue whether the pursuer had been induced to purchase bank stock by false and fraudulent representations made by the defenders, the jury returned a verdict that the pursuer was induced to make the purchases by the false representations of the defenders, but that these representations were not fraudulent. That verdict, the presiding judge informed them, was necessarily, in his opinion, a verdict for the defenders, but the foreman of the jury said it was meant as a verdict for the pursuer. The verdict was recorded as returned. It contained no assessment of damages. The pursuer moved for a new trial, and produced affidavits by the foreman and nine of the jurymen, who declared that they meant the verdict to be for the pursuer; that unless they had thought it was for the pursuer, they would not have returned it; that they had agreed on the amount of damages which they were prepared to have found due, and that the foreman would have stated the amount, but that from what was said by the judge, he received the impression that the assessment of the damage was the province of the Court. The verdict was therefore objected to as proceeding on a misapprehension by the jury. It was also objected to as being neither a complete special verdict, because it contained no assessment of the damage, nor a general verdict, because it contained no general finding for pursuer or defender. The Court held that, with regard to what passed in open Court, the statement by the presiding judge was conclusive, and that affidavits of the jurymen could not have been received in contradiction of that statement, nor regarded if inconsistent with it; but they considered that there was in fact no inconsistency between the judge's statement and the affidavit; that the verdict was a distinct and exhaustive answer to the issue; that it was a general verdict, and that it was no objection to it, as such, that it contained no general finding for pursuer or

§ 49. Notwithstanding this strictness, clerical errors which have been committed in engrossing the verdict in civil cases, may be corrected on application to the Court (*k*), and this would probably be allowed in criminal cases also (*l*). Baron Hume mentions a few instances in which the original and the record copy of the written verdict were compared in consequence of it being alleged

(*k*) Kirk *v.* Guthrie, 1817, 1 Mur., 279—Dalziel *v.* D. Queensberry's Exrs., 1826, 4 Mur., 18—Macf. Prac., 239—See also Ritchie *v.* Ferguson, 1849, 12 D., 119.

(*l*) See Henry *v.* Young, 1846, Arkl., 105, where the word "her" had been written over "him" in the record of a criminal sentence by the Sheriff, and the Court held it not to be fatal, on the presumption that the sentence had been read over to the prisoner in its altered state.

defender; that, inasmuch as it negatived fraud, it was necessarily a verdict for the defenders; that an assessment of damages could not have altered the nature of the verdict, but would have been useless and absurd; and that no regard could be paid to the statement of the jury that they would not have returned the verdict unless they had thought it was a verdict for the pursuer, because that amounted to an assertion by the jury that they would, from favour to the pursuer, have abstained from returning a verdict in accordance with the facts.

Lord Wood, holding the affidavits immaterial, found it unnecessary to determine for what purposes they were admissible, or whether they were admissible at all. Lord Cowan thought that, in regard to what passed in Court, the statement of the presiding judge, made from his notes at the trial, could alone be received; and that the jurymen could not be allowed, either directly by themselves, or through their foreman, to impugn what passed in their presence and in open Court, in reference to the verdict returned and recorded with their consent; but that, with respect to occurrences not in presence of the Court, and which might affect the regularity of the procedure and conduct of the jury, the affidavits might be legitimately considered; when the foreman had committed a mistake as to the views of the jury, that had been allowed to be the subject of inquiry by affidavit tendered immediately on discovery of the error. His Lordship held, however, that the affidavits of jurymen were not admissible to prove the misconduct of the jury, or other wrongous procedure, whereby the verdict had been improperly obtained or unjustly returned; but that the affidavits of all other persons were admissible for that purpose. Lord Benholme would have hesitated to admit the competency of the affidavits had they been intended to impeach the verdict returned and assented to in open Court; it would be very dangerous "to admit of such *ex post facto* impeachment by the jury of their own solemn and public declaration on oath;" Dobbie *v.* Johnston and Russell, 1861, 23 D., 1139—Harvey *v.* Hewitt, 1840, 8 Dowling's Practice Cases, 598—Cogan *v.* Ebden, 1757, 1 Burrows, 383—Stewart *v.* Fraser, *supra*—M'Whir *v.* Maxwell, *supra*.

That it is not necessary, that in a general verdict there should be a general finding for either pursuer or defender, was decided in Kyle *v.* M'Pherson, 1856, 18 D., 1031.

There was held to be no good objection to the competency of a verdict which was returned in the absence of the pursuer's counsel and agent, who came into Court when the clerk was writing it out; Dobbie *v.* Johnston and Russell, *supra*. The Court refused a motion for a new trial, on the ground of the verdict having been returned and delivered to the clerk of Court in absence of the judge, holding that the parties having taken no exception to his absence, had consented to dispense with his presence; Brownlie *v.* Tennant & Co., 1855, 17 D., 422.

that they were dissimilar (*m*). But it does not appear whether this could be done in order to correct the record, or only in order to overturn it, if inaccurate. The same learned commentator thinks it a difficult question whether the Court could entertain the allegation that a material word had by inadvertence been omitted in a written verdict, *e.g.*, that *not* had been omitted before *guilty* (*n*).[5]

§ 50. The House of Lords recently took a much wider view than had previously been entertained of the power of the Court of Session over verdicts in civil trials before them. This occurred in an action of reduction improbation of certain transferences of money and bills, where the issues were alternatively, "whether the defender, taking advantage of the weakness and facility" of the ancestor of the pursuer, "did by fraud or circumvention or intimidation procure the subscriptions," &c., to the documents in issue. The jury returned a verdict "for the pursuer;" which, having been entered on record in these terms by the clerk, was objected to as ambiguous, because it did not show which of the alternatives in issue was found proved. The House of Lords, on the opinion of Lord Truro, held that this was a mis-entry by the clerk, that the record should have borne that the jury found that the particular "documents were obtained from the deceased by such and such means,"—but that the entry might still be corrected by the Court from the notes of the judge who presided at the trial. The case was accordingly remitted to the Court of Session; and the entry of the verdict was amended so as to make it specific on the several facts in issue (*o*). This proceeding, borrowed from the English practice, is a convenient novelty in the law of Scotland.[6]

(*m*) Blair, 1681, 2 Hume, 429—Cunningham, 1780, ib.—Hog *v.* Souter, 1738, Hume, ib.—See also Livingstone, 1749, ib., and Maclaurin's Cr. Ca., No. 55, S. C.

(*n*) 2 Hume, 430. (*o*) Marianski *v.* Cairns, 1852, 1 Macq., 212, and 15 D., 268.[6]

[5] Perhaps the competency of such an alteration could not now be doubted, after the observations made in the House of Lords in Marianski *v.* Cairns, 1851 and 1854, Macqueen, p. 212, 766—Morgan *v.* Morris, 1858, 3 Macqueen, 823.

[6] The judgment of the Court was affirmed on appeal; Marianski *v.* Cairns, 1854, 1 Macqueen. The rule of practice appears, however, to have been misunderstood and misapplied by the Court in the subsequent case of Morgan *v.* Morris. The distinction between what was then held to be beyond the power of the Court, and what in the case of Marianski was held to be within the competency of the Court, seems somewhat narrow. In Morgan *v.* Morris, the issues adjusted in a multiplepoinding regarding the estate of a deceased, were, (1) whether the pursuer A. M. was nearest and lawful heir of the deceased; (2) whether the pursuer J. M. was, along with A. M., next of kin of the deceased. The jury found "the case for the pursuers is not proven." The Court applied the verdict on the motion of the defenders, and repelled the claims of A. M. and J. M. On appeal,

§ 51. In connection with this subject, it may be mentioned that decrees-arbitral are not effectual until they have been delivered as finished writs, or have been recorded. If the arbiter has only

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the House of Lords held that the verdict was uncertain, because it did not show whether the pursuers had failed in proving both the issues, or only one of them; and the cause having been remitted, the Court of Session endeavoured to follow out the procedure sanctioned in the case of Marianski, by amending the verdict. They considered the notes of evidence of the presiding judge and his notes of his charge, and having requested his Lordship to state in what manner he would at the trial have directed the verdict to be entered, if any motion had been made respecting the general terms in which the verdict was returned, his Lordship stated that he would have directed the clerk to enter a verdict that the jury "find the case for the pursuers is not proven, and therefore that upon the first issue they find that it is not proven that the pursuer A. M. is nearest and lawful heir of" the deceased: "and upon the second issue, that they find that it is not proven that the pursuer J. M. is, along with said A. M., next of kin of the" deceased. The Court thereupon "find that it is competent for the Court, after a verdict has been taken down in terms which are uncertain or ambiguous, to consider and examine the notes of the evidence, and the summing up of the judge, with the report of his opinion, in order to ascertain, provided they have clear materials for doing so, the true meaning of the jury according to the actual substance of the questions at issue between the parties on the evidence adduced, so as to enter the verdict in the form and manner adapted to the truth and reality of the case. And with the materials afforded to the Court in this case in the judge's notes of the evidence, and of his summing up, and his opinion in the case, the Lords find, in concurrence with the view taken by the judge at the trial, that substantially one point, and one point only, of importance was in dispute between the parties, and on which the answer to each issue equally depended; viz., whether the father of the pursuer" was a brother of the father of the deceased; and that if the pursuers failed to prove that, a verdict finding such failure "clearly imported in the intention and opinion of the jury that a negative answer must be returned, equally on each of the issues;" and their Lordships accordingly directed the verdict to be entered in the terms in which (as above quoted) Lord Justice Clerk (Hope) had stated that he would at the trial have directed them to be entered. But the House of Lords, on appeal, distinguished the case from that of Marianski, which they held merely to authorise the correction of an erroneous entry by the clerk of a good and sufficient verdict; but they held that in the case of Morgan, it was not the entry which was erroneous, but the verdict itself which was bad and uncertain; where an uncertain verdict was once received and recorded, the Court had no power to amend it, and the only remedy was a new trial; an erroneous entry of a verdict rightly returned might always be corrected, but not a bad verdict. Lord Cranworth thought the amended verdict as bad as the original verdict, because it merely deduced the special findings applicable to each issue from the general verdict, whereas the only reason why the general verdict had been held uncertain, was that it could not, by logical deduction, be specially applied to each issue; Morgan *v.* Morris, 1855, 2 Macqueen, 342, 350; 1856, 18 D., 797; 1858, 3 Macqueen, 323. Where a jury returned a special verdict, which did not afford sufficient materials for a judgment in favour of either party, the Court directed a new trial; Caledonian and Dumbartonshire Railway Co., 1854, 17 D., 25. But where a jury give damages for matters which they cannot competently include in their verdict, such an error may, it is thought, be corrected without a new trial; *per* Lord Chancellor in Morgan *v.* Morris, p. 334, quoting Dalziel *v.* Queensberry's Executors, 4 Mur. 18.

issued a copy of his decree without parting with the principal (*p*), or has only delivered the principal to the clerk of the submission (*r*), it is held to be an intended not a final decree. An imperfect decree-arbitral, even in a verbal submission, cannot be completed by proving what the arbiter intended to find (*s*). Nor are notes issued by him intimating the terms of his intended judgment equivalent to a decree, as they do not contain a final decision (*t*). Consequently the issuing of them will not empower the arbiter to sign a decree-arbitral in their terms after the submission has expired (*u*).

The subject of the preceding paragraphs is resumed in treating of the effect of judicial records, and the admissibility of extrinsic evidence to contradict or explain formal writings.

CHAPTER III.—VARIANCE BETWEEN THE ALLEGATION AND THE PROOF.

§ 52. As the object of making up a record is to bring out the facts in dispute between the parties, and thus to prevent surprise on either side, a different case from that which is averred cannot be proved, although it may in itself be a good ground of action or defence. On the other hand, slight and immaterial differences between the libel or the issue and the proof will be disregarded, because they cannot prejudice the other party, and ordinary care will not prevent them from occasionally happening. The question, whether the variance in any particular case is substantial, depends on the nature of the allegation, and the object for which it is made. It is therefore impossible to lay down any precise rules for determining such questions. The application of the general principle, however, will be seen from the following illustrations.

A case laid upon a verbal agreement between the pursuer and defender cannot be made out under the stipulations of a written lease from a third party to the defender (*x*). Under a summons laid on a vitiated bill, decree cannot be obtained for payment of a different bill, which had been retired by the one libelled on (*y*). A

(*p*) Gray *v.* M'Nair, 1831, 5 S., 735; affd., 5 W. and S., 305. See this noticed in the chapter on the Delivery of Deeds. (*r*) Robertson *v.* Ramsay, 1783, M., 653, 17,009; Hailes, 912, S. C., compared with Simpson *v.* Strachan, 1786, M., 17,007; Elch. Arbitration, No. 2. (*s*) Campbell *v.* Mitchell, 1831, 9 S., 875. (*t*) Lang *v.* Brown, 1852, 15 D., 38. (*u*) Lang *v.* Brown, *supra.* (*x*) Still's Tr. *v.* Chivas, 1829, 8 S., 9. (*y*) Murdoch & Co. *v.* Lee, 1801, House of Lords, 2 De. & And., 341, note.

party claiming delivery of a bill bearing to be indorsed by him, and which he alleged he had delivered to the defender for a special purpose, may not prove that his signature was forged, there being no averment in the summons to cover such a case (*z*). An action laid upon a bill indorsed by the pursuers to the defender cannot be substantiated by a bill indorsed by the defender to a bank and thereafter retired by the pursuers (*a*). Proof of an act of homologation will not be sufficient under a general issue of usage of trade, even where, if properly averred, it would have been conclusive of the case (*b*). An action laid on an agreement between the pursuer and defender to keep house together at their mutual expense, cannot be substantiated by proving a claim for board and maintenance (*c*). A claim for payment of £1000 as the tocher due to the pursuer on his marriage with the defender's daughter, cannot be made out by proving the defender's promise to give £1000 to his daughter for herself and her children (*d*). So in an action for repayment of a sum as having been advanced to the defender, the pursuer may not prove a case of professional negligence in the defender (who was her law agent), in advancing the money for her on a bad security (*e*). Under an issue whether a certain change in the direction of the boundary stream between two properties had been produced by the improper operations of William Kerr, evidence of operations by Gilbert Kerr was excluded (*f*). On the same principle it is incompetent in an action for defamation to prove a different slander (*g*), or one uttered in a different language (*h*), from the slander averrred. And where the issue embraces a specific slander, "or other expressions to that effect," the alternative will only cover slight variations from the words specified, and not entirely different words, although similar in meaning (*i*). It was also recently held that under an issue whether the defender had by an innuendo charged the pursuer with "having been a prisoner at the bar of a police court charged with a criminal offence, and having obtained possession of pledges or pledged goods by improper or unlawful means, or under circumstances inferring criminal conduct" on his part, it would not be competent to state the innuendo to the jury as being, that the pur-

(*z*) Ker *v.* Baird, 1827, 5 S., 926. (*a*) Ewing's Tr. *v.* Farquharson, 1829, 7 S., 464. (*b*) Sheriff *v.* Stein's Assig., 1828, 4 Mur., 457. But the homologation is relevant evidence of the usage; ib. 464. (*c*) Cunningham *v.* M'Gachen, 1831, 9 S., 472. (*d*) Nicolson *v.* M'Alister, 1830, 8 S., 488. (*e*) Hunter *v.* Orr, 1837, 16 S., 201. (*f*) M. Tweeddale *v.* Kerr, 1821, 2 Mur., 572. (*g*) Ross *v.* Monro, 1803, Hume, 621. (*h*) Martin *v.* M'Lean, 1844, 6 D., 981. (*i*) Martin *v.* M'Lean, ib.—Ross *v.* Monro, ib.

suer had received goods knowing them to be stolen (*k*). Lord Chief Commissioner Adam once observed that "scoundrel" and "rascal" are so far synonymous, that an issue laid upon the one expression might be proved by evidence of the other (*l*). An important illustration of the consequences of a variance between the issue and the proof occurred in a recent case, where a party raised an action of damages on the ground that the defender by himself, or others authorised by him, had entered the pursuer's premises, searched them on a charge of theft or reset, and carried away from them a quantity of lead, on the false pretence that it had been stolen from the defender; and on the farther ground, that this was done maliciously and without probable cause; and where the defender pleaded that he had without malice acted under a regular warrant obtained from a magistrate for recovery of lead which had been stolen from his premises. The case having been tried on an issue whether the defender, by himself, or those acting under his authority, had wrongfully and illegally entered the pursuer's premises, and carried away the lead on the false and calumnious allegation that it had been stolen, the presiding judge directed the jury that the warrant which the defender had obtained was legal and valid, but that the pursuer was entitled to a verdict, if the jury were satisfied that the entry and seizure had been made by or on behalf of the defender, maliciously and without probable cause. On a bill of exceptions, however, it was held that this direction was erroneous, that the pursuer could not under his record and issue prove that the defender had acted maliciously and without probable cause in applying for the warrant, and that the jury should have been directed that if the entry and seizure were made by constables acting under the warrant, the defender was entitled to a verdict (*m*). The ground of decision was, that the pursuer by his averments and issue undertook to prove that the defender had entered the premises and made the seizure wrongfully and illegally, without a legal warrant; whereas, at the trial he attempted to prove that the defender had obtained and used a legal warrant maliciously, and without probable cause. Consequently, although the pursuer's proof would have entitled him to a verdict under an issue of malice and want of probable cause, it was not a proper answer to the issue on which the cause was tried. This case also illustrates the principle that when malice is essential to the pursuer

(*k*) Scouller *v.* Gun, 1852, 14 D., 920. (*l*) Christian *v.* Kennedy, 1818, 1 Mur., 427, per Lord Chief Commissioner. (*m*) Graham *v.* M'Lauchlan, 1853, 15 D., 889.

obtaining a verdict, it must not only be proved at the trial, but must be covered by the issue.[1]

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[1] Where the pursuer's averments disclose a case of privilege, malice must be averred and put in issue. But where, in an action of damages for slander, the pursuer's averments do not disclose a case of privilege, and where therefore he does not take an issue of malice, and where the evidence discloses that the defender was in a privileged position, it would rather appear that the pursuer can maintain his case by proof of malice, though it be neither expressly covered by his issue nor averred in his record. The principle seems to be somewhat of this kind:—A pursuer, in an action for defamation, cannot get a verdict unless the defamation be held malicious, either by presumption of law, or as the conclusion from evidence. But malice is always presumed where no privilege is disclosed; disclosure of privilege rebuts the presumption of malice and shifts the onus; but where the privilege is disclosed, not on the pursuer's averments, but during the trial, it would seem that the pursuer can support by evidence the presumption with which he started, and satisfy the *onus probandi* which the disclosure of malice has thrown on him; Fenton *v.* Currie, 1843, 5 D., 707—Dunbar *v.* Stoddart, 1849, 11 D., 587—Graham *v.* M'Laughlan, *ut supra*, per Lords Justice-Clerk Hope and Wood. But see Dallas *v.* Mann, 1853, 15 D., 746, in which, in an action of damages for the defender having wrongfully lodged information with a procurator fiscal that the pursuer had been guilty of theft, it was held that an averment of want of probable cause was essential to the pursuer's action, and the Court refused to allow an averment to that effect to be added on revisal, but dismissed the action as irrelevant. See also Cameron *v.* Hamilton, 1856, 18 D., 423, and Watson *v.* Burnet, 1862, 24 D., 494, in which latter case an action of damages for defamation, brought by a servant against her mistress, was dismissed as irrelevant for want of an averment of malice, the Court refusing to allow the pursuer to add the averment.

The following cases, lately decided, afford additional illustrations of the principle that only the case averred can be proved. In defence to an action of damages for having wrongfully given the pursuer into custody of a policeman, the defender set forth on record that the pursuer had assaulted him; but at the trial he endeavoured to prove that the pursuer had assaulted two ladies in his, the defender's, society. It was held that his record did not cover that defence; Smith *v.* Green, 1854, 16 D., 429. Where an heritable subject was wrongly described in a summons and condescendence the Court refused to allow an issue in regard to it, "as described in the schedule appended," in which schedule the subject was described correctly; Messer *v.* Simson, 1857, 19 D., 664. In an action for payment for work done, brought on the ground of employment, the Court refused an issue, whether the defender "approved of and adopted" the work; but allowed an issue, whether the work was executed on the employment of the defender; Neilson *v.* Ritchie, 1861, 23 D., 1300. So in an action by the representatives of a solicitor for a business account prescribed, the defender deponed on reference that he employed the agent in an action, but on condition that he was to be paid for his services only if the action was successful; the Court held that the oath was negative, because the contract it admitted was not the contract libelled; Knox *v.* M'Caul, 1861, 24 D., 16. In the case of Trodden *v.* Sweetman, the question whether a case somewhat different from that alleged might be proved, occurred in rather unusual circumstances. The action was for the price of potatoes, averred by the pursuer to have been sold at £5, 5s. per ton, and the defender admitted the purchase, but alleged that the price was £4, 5s. per ton. The pursuer proposed as an issue, whether he had sold and delivered to the defender 40 tons of potatoes, and whether the defender was owing him £205 (£5 having been paid to account), his object being, that if he failed to prove a sale at £5, 5s., he might still get a

§ 53. A variance between the reason or ground of action libelled and that proved may be fatal, although the contract and facts are correctly set forth. Thus, where a bill or assignation is challenged on the ground of non-onerosity, effect will not be given to the oath on reference of the holder or assignee admitting want of *bona fides* (*n*). And in an action of reduction by a tenant of his lease, the only ground of action being that the defender had fraudulently misrepresented the extent of the farm, a case of error *in essentialibus* as to the extent will be ineffectual (*o*). So where a party raised an action for repayment of a certain sum, on the ground of the defender's refusal to execute venditions of shares of a ship in terms of a contract between them, and where the defender offered to execute the requisite deeds, the pursuer was not allowed to demand the money on the ground of the contract being null under the Registry Acts (*p*). On the same principle, where an action was raised against creditors on a sequestrated estate, on the ground that certain acts inferring their liability were within the powers of the trustee, it was held incompetent to make out the case, in respect of acts alleged to have been beyond his powers (*r*). But in a case of facility and impetration it was held that the issue, whether the granter of certain writings and securities was "weak and facile and easily imposed upon," would cover a case of helplessness and dependence of old age, with its incapacity to resist violence or intimi-

(*n*) Brown *v.* Moncur, 1837, 15 S., 1230—Megget *v.* Brown, 1827, 5 S., 343.

(*o*) Balmer *v.* Hogarth, 1830, 8 S., 715, *infra*, § 67. See also Peacock *v.* Glen, 1821, 1 S., 168. (*p*) Barr *v.* Bruce, 1846, 9 D., 222. (*r*) Kirkland *v.* Cadell, 6th July 1839, F.C.

verdict for the market price of the potatoes, or at least for their price at the rate admitted by the defender. But the Court held that the pursuer was bound to put in issue whether he had sold the potatoes at £5, 5s. per ton, and whether the defender was owing £205. On trial of this issue, the jury found for the defender, and added to their verdict a finding that the potatoes were sold at £4, 5s. per ton, and that that price was stated in the pursuer's letter of offer, by mistake, for £5, 5s. The Court, however, on the motion of the pursuer, in absence of the defender, who was a foreigner, and who failed to sist a mandatory (his former mandatory having become bankrupt), decerned against the defender for £170, being the price of the potatoes at £4, 5s. But it was remarked on the bench, that the pursuer's motion would have been considered as raising a very difficult and important question, had the defender appeared to resist it; Trodden *v.* Sweetman, 1862, 24 D., 600 and 1860. It would rather seem that in this case the pursuer got in judgment what he was not allowed to put in issue.

Where, in an action against directors of a bank, the pursuers on record rested their action on the joint delinquency of the defenders, they were held not entitled to an issue charging against any one of the defenders an individual and several delict, in which it was not said that any of the other defenders were participant; Western Bank of Scotland *v.* Bairds, 1862, 24 D., 859.

dation, and that such incapacity would be sufficient without proving weak or defective intellect (*s*).

§ 54. An error in the character in which the pursuer sues will be fatal, if it goes to the essence of the case, as where he claimed the balance due to him as overseer of a certain building, and it appeared from the evidence that he had been contractor (*t*). The same rule applies to the character in which the defender is sued; so that an action against a party as "owner or part owner" of a ship, will not sustain a claim for the same sums on account of his administration and management of the vessel (*u*); and a summons laid on the passive title under a charge to enter heir will not cover a liability on the ground of *gestio pro haerede* (*x*).

§ 55. Although it may be highly probable that the contract or slander averred is the same as that proved, yet a variance between them in a matter of essential description will be fatal; because the other party having come prepared to meet a certain defined case, he might be surprised and seriously prejudiced, if a case materially different in description were allowed to be proved against him. Accordingly, under an issue whether certain false play at cards took place in a certain person's house in Great King Street, proof of such play in his house in Melville Street was excluded (*y*). In one case where a slander was averred as having been uttered on the Pier of Leith, but was proved not to have been uttered on the pier commonly known by that name, but on the custom-house pier or slip, the pursuer's counsel gave up that part of his case. But the presiding judge observed that, if it had been insisted in, he would have left it to the jury to say whether in common acceptation the general term "Leith Pier" comprehended the pier or slip in question (*z*). A variance on this head, however, will only be fatal where the *locus* is essential to the description of the subject of the action, as where from the nature of the case it might prevent the defender from proving an alibi. The *locus contractus* is generally immaterial, unless where a question of jurisdiction is involved.

§ 56. Mis-description in the date may be fatal; as where the issue was whether the defender lodged a slanderous paper in process on or about 18th November 1828, but the paper put in evidence was dated 18th February 1828 (*a*). And a summons of consti-

(*s*) Cairns *v.* Marianski, 1850, 12 D., 1286. (*t*) Holcombe *v.* Stewart, 1842, 4 D., 1316. See also Pollock *v.* Mather, 1828, 7 S., 675—Shand Pr., 217.

(*u*) Dempster & Co. *v.* Dryburgh, 1837, 16 S., 109. (*x*) Ferguson *v.* M'Gachan, 1829, 7 S., 580. (*y*) Paterson *v.* Shaw, 1830, 5 Mur., 281. (*z*) Forbes *v.* Kirk, 1842, 4 D., 1177. (*a*) Cullen *v.* Ewing, 1832, 10 S., 497, 748.

tution on a bill described as of the 9th of the month, was held not to cover decree for payment of a bill dated the 19th (*b*). In such cases the date is essential to the identification of the subject of the action, since, if errors in it were overlooked, the other party might be materially prejudiced in his defence, and would not have the full benefit of the decree as *res judicata*. When such consequences would not ensue, errors on this head will be overlooked, as where a summons for the aliment of a bastard child stated the birth to have been on 3d February, but the pursuer in her oath in supplement deponed that it happened on 3d January (*c*). So in an action for repayment of money as having been advanced on a certain day, where the pursuer succeeded on a proof, and the defender thereupon referred the case to his oath, the pursuer got decree, although he deponed that the sum had been advanced not on the day libelled, but at different times and in several sums (*d*). Here, however, the pursuer was in the favourable position of having already proved his case as laid; and he was therefore entitled to decree, unless his deposition shewed that he was in the wrong.[2]

Where a summons was laid on a bill as drawn by the pursuer, it was held incompetent to proceed with the action as for a bill in which his name had been written by another person for him by procuration, and which he had afterwards adopted (*e*).

§ 57. A verdict by which only a part of the issue or libel is found proved, is good as to that part, unless the omission alters the nature of the case. And, on the other hand, where the verdict finds more than the issue covers, it will be good to the smaller extent, provided the variance is only in extent or degree, not in kind. For example, where a summons claimed a right of way as having been acquired by the inhabitants of certain towns and places in the neigbourhood, a verdict finding a public right of way was effectual (*f*).[3] The English law on this point is stated by Mr Star-

(*b*) Barclay *v.* Alexander, 1846, 8 D., 549. There was also a mis-description in libelling on the partial payments of the contents of the bill. See also Freebairn *v.* Dalrymple, 1829, 7 S., 476. (*c*) Hutchison *v.* Thomas, 1828, 6 S., 1130.

(*d*) M'Donnell *v.* Ranken, 1830, 8 S., 815. (*e*) Muir *v.* Braidwood, 1831, 10 S., 83—Jackson *v.* Williamson, 1825, 4 S., 292. (*f*) Rogers *v.* Harvie, 1829, 7 S., 287—M'Ghie *v.* M'Kirdy, 1850, 12 D., 442. But see E. of Morton *v.* Stewart, 1813, 1 Dow, 91.

[2] In an action for slander the pursuer was allowed, after the record was closed, to correct an erroneous statement of the date of the alleged slander; Bayne *v.* Macgregor, 1862, 24 D., 1126—*supra*, § 45, note 8.

[3] The pursuers of a summons to have the defenders ordained to remove obstructions

kie (*g*) and Mr Greenleaf (*h*) in the following terms—There is a material distinction between variance which arises from redundancy in the allegation and that which arises from redundancy in the proof. In the former case, a variance between the allegations and the proof will be fatal, if the redundant allegations are descriptive of that which is essential. But in the latter case redundancy cannot vitiate merely because more is proved than is alleged, unless the matter superfluously proved goes to contradict some essential part of the allegation. Thus if the allegation were that, in consideration of £100, the defendant promised to go to Rome, and also to deliver a certain horse to the plaintiff, and if the plaintiff should fail in proving the latter branch of the promise, the variance would be fatal, although he sought to recover for the breach of the former only, and the latter allegation was unnecessary. But if he alleged only the former part of the promise, proof of the latter along with it would be immaterial. In the first case, he has described an undertaking which he has not proved; but in the latter he has merely alleged one promise, and proved that and also another. But where the subject is entire, as, for example, the consideration of a contract, a variance in the proof shews the allegation to be defective, and is therefore material. Thus, if it were alleged that the defendant promised to pay £100 in consideration of the plaintiff's going to Rome and also delivering a horse to the defendant, an omission to prove the whole consideration alleged would be fatal. And if the consideration had been alleged to consist of the going to Rome only, yet if the agreement to deliver the horse were also proved, as forming part of the consideration, it would be equally fatal, the entire thing alleged and the entire thing proved not being identical.

§ 58. Cases of variance between the libel and verdict are dealt with strictly in criminal cases; and for this obvious reason, that penal consequences ought only to follow on a verdict which finds the prisoner guilty of the specific crime charged against him. The prisoner will therefore be assoilzied, if he is found guilty not of the offence libelled, but of one different, although analogous. This is the case where a verdict of guilty of reset is returned in a charge of theft, and where the prisoner accused of rape is found guilty of

(*g*) 1 Starkie, 460. (*h*) 1 Greenl., 89.

from a road of which the pursuers and their predecessors had, from time immemorial, "free use, and over which they have the right and servitude of road," were held to have failed in the proof of their case, although they established a public right of way along the road; Thomson *v.* Murdoch, 1862, 24 D., 975.

assault with intent to ravish (*i*). For the same reason the prosecutor in a charge of mobbing and rioting may not prove that one of the prisoners forced a person to take an unlawful oath, as that is not one of the ordinary acts of a mob (*j*). So a verdict of guilty of robbery will not meet a charge of theft, and *vice versa* (*k*). And a conviction of a specific crime of murder or wilful fire-raising is incompetent in a charge of conspiracy of workmen to keep up wages by means of these crimes (*l*).

§ 59. But a verdict which finds an offence only lower in degree than the one libelled, without being specifically different, is good for the smaller crime. On this ground a verdict of culpable homicide may be competently returned under an indictment for murder, because it finds homicide without the malice which goes to constitute the capital crime (*m*). Mr Alison doubts whether a verdict of theft would not be good in a charge of stouthrief, which is masterful theft (*n*). But it is difficult to reconcile this view with the principle that robbery (which, according to Baron Hume (*o*), is the modern name of stouthrief) is specifically different from theft (*p*). Where there is a main charge coupled with an aggravation, the jury may of course find the former proved and negative the latter. Mr Alison (*q*), however, thinks that such a verdict is not good when the aggravated offence is laid specifically, *e.g.*, "assault with intent to ravish." This question is not likely to arise, as the practice is to charge the main offence independently, with the aggravation added to it thus,—"assault, especially when committed with intent to ravish." In some cases a verdict finding only part of the charge proved is equivalent to one of acquittal; as, where forgery and uttering are libelled, but the verdict only finds the forgery, which is not a point of dittay without the uttering (*r*). On the same principle, a party charged with having used a measure not authorised by the Weights and Measures Act, was assoilzied under a verdict which only found that he had the measure in his possession (*s*).

§ 60. A verdict finding the offence as having been committed at a different time or place from those libelled is bad; because these are essential to the description of the crime, and a variance in them

(*i*) Hume, 449, 2 Al., 645. (*j*) Cairns, 1837, 1 Sw., 597.
(*k*) Wallace, 1821, Sh. Cr., 30—1 Al., 227. (*l*) Hunters, 1838, 2 Sw., 1.
(*m*) 2 Hume, 186—2 Al., 282, 645. See Horn, 1824, Sh. Cr., 114. (*n*) 1 Al., 228.
(*o*) 1 Hume, 104. (*p*) *Supra*, (*k*). (*q*) 2 Al., 283, 646.
(*r*) Edwards, 1827, Syme, 277, and Appx., 47. (*s*) Allan *v*, Baird, 1842, 2 Broun, 294.

may have deprived the panel of his defence of an alibi (*t*). This rule was applied somewhat strictly to the case of an assault charged as committed in a house occupied by Jane Riddell or Turnbull, but which was proved to have been occupied not by her, but by her son George Turnbull (*u*). In another case, where the prisoner was charged with having stolen a thimble from a lockfast chest of drawers, it was held a fatal variance that the proof shewed it was from a box on the top of the chest (*x*). But a slight variance, which could not have prejudiced the prisoner in his defence, will not be fatal; as where a rape was charged as having been committed at or near the wall which "forms the west boundary" of a certain bleaching green, and it turned out that the wall was the south boundary (*y*).[4]

§ 61. Slight differences between the description and the proof of the subject of the crime have been held fatal. In a charge of rape on Christian Urquhart, "daughter of, *and then and now* or lately residing with Alexander Urquhart, labourer at Knockie, in the parish of Turiff and county of Aberdeen," the proof established that, at the time libelled, she was living with another person; and the panel was acquitted, although there was no doubt of the identity (*z*). And in a charge of murdering a child, "daughter of Marion

(*t*) 2 Hume, 207. On this account, when the time or place of the offence cannot be precisely fixed, the prosecutor is allowed to add to his usual description the words "or at some other time (or place) to the prosecutor unknown;" 2 Hume, 215. But if the evidence shews that he has done this unwarrantably, the Court will probably interfere and stop the trial; see Gillies, 1831, Bell's Notes, 197, 198—Walker, 1838, ibid., 199.

(*u*) Cairns, 1837, 1 Sw., 597. (*x*) Gardner, 1837, 1 Sw., 548. This decision may be questioned. (*y*) Henderson, 1836, 1 Sw., 316. The subject of this section is fully treated in 2 Hume, 207—2 Al., 257—Bell's Notes, 207.

(*z*) Murray, 1826, 2 Hume, 197, note—2 Al., 285.

[4] A panel was charged with having committed an offence in Oban, in the parish of Oban and county of Argyle. There was no parish of Oban, but the Lord Justice-Clerk (Boyle) allowed the prosecutor to amend the indictment by striking out the words "in the parish of Oban;" Lord Advocate *v.* M'Intyre, referred to in Maxwell *v.* Black and Morrison, 1860, 3 Irvine, 592, in which, where a panel was convicted in the Sheriff-court on a charge of an offence, said to have been committed in his own house in the parish of Auchtermuchty in Fife, the conviction was quashed in the High Court on admission that the panel's house was in the neighbouring parish of Collessie. This case was held to be distinguished from that of M'Intyre, because in the case of Maxwell there was a false averment about the locus of the offence, whereas in the case of M'Intyre it was not averred that the offence had taken place in any existing geographical area different from the true locus. The Lord Justice-Clerk (Inglis) laid it down as a general rule that if in an indictment the parish be stated incorrectly, the error will be fatal to the indictment; Maxwell *v.* Black and Morrison.

Hepburn," it was proved that the mother (whose name was Hepburn), had been baptised "Elspeth Menny," after her mother, whose last name was "Menny," that she had dropt the name "Elspeth," had given her name as "Menny" when examined before the Sheriff, and only while six months in one service had been called "Marion." This was held a fatal variance, although "Meney" is the common Scotch abbreviation for "Marion," and there was no doubt that *constabat de persona* (*a*). A charge of assaulting a person named M'Tiggan was not allowed to be proved by evidence of an assault on one M'Figgan (*b*), although otherwise the descriptions agreed. But if the injured party is rightly named, an error in his designation will be overlooked, if it does not affect his identification; as where he was described as a merchant, and it appeared that he was only a merchant's clerk (*c*), and where he was described as a lamp-lighter instead of a bill-sticker (*d*). In one case, where the person alleged to have been murdered was designed as the daughter of two persons correctly named, but the father was described as a wright instead of a tailor, the charge was abandoned (*e*). It appears, however, that if the prosecutor had pressed the case, the Court would have directed the jury to convict (*f*). Accordingly in a charge of theft of a black and white plaid, which was proved to be blue and white, the variance was held immaterial (*g*). A similar decision was pronounced where, in a charge of forgery and uttering, the uttering was libelled as made to Galloway, the agent at Airdrie for the National Bank, and the proof showed that the document had been given to Somerville, and by him to Galloway, who was in the bank at the time (*h*).[5]

Farther illustrations on these points will be found in the works of Baron Hume, Mr Burnett, and Mr Alison. It must be observed, however, that the last named author states the law too strictly as

(*a*) Ferguson, 1831, Sh. Cr., 289.
(*b*) Muir, 1821, Sh. Cr., 55.
(*c*) M'Avoy, 1837, 1 Sw., 456.
(*d*) M'Gee, 1837, 1 Sw., 425.
(*e*) Hannay, 1806, 2 Hume, 197.
(*f*) Per Lord Meadowbank in M'Gee, *supra*.
(*g*) Henry *v.* Young, 1846, Arkl., 105.
(*h*) Pender, 1836, 1 Sw., 25.

[5] A prisoner charged with the murder of "Alexander Davidson, sawyer at Dallulich, in the parish of Edinkillie and shire of Elgin," was held entitled to a verdict of not guilty, on proof that the murdered person, Alexander Davidson, sawyer, resided at Dallulich, in the parish of *Ardclach* and shire of *Nairne*; Lord Advocate *v.* M'Pherson, 1824; explained by the Lord Justice-Clerk (Inglis) in Maxwell *v.* Black and Morrison, 1860, 3 Irv., 592. The notice of the case of M'Pherson in Alison's Practice, p. 262, is erroneous.

to variance between the libel and the proof, both in regard to the *corpus delicti* (*i*) and *locus delicti* (*k*).

§ 62. Where there is clearly a variance between a party's line of proof and his record, the Court will interfere during the trial; but if it is doubtful, the case will be allowed to go to the jury, under a direction as to the variance (*l*). For example, where an assault by firing a loaded gun was laid as at a wood called Straiton Dean, and some of the witnesses called the place Struckon Dean, the Court held that if the act were proved to have been committed at the latter place, the objection would have been fatal, but that the evidence was contradictory, and that it lay with the jury to decide the matter (*m*).

§ 63. When the presiding judge is doubtful whether there is a fatal variance between the evidence and the issue, especially in civil cases, he frequently directs the jury to return a special verdict, finding the facts which they consider to have been proved: and the Court have thereupon to determine whether the verdict affirms or negatives the issue. It is also competent for the presiding judges in civil cases in the Court of Session "to order and direct any facts not falling under the issues, but which shall appear in evidence, and which they shall deem material to the merits of the case or important to the decision of the law, to be found by the jury, and to be indorsed on the issue or issues, or on a paper or parchment to be attached to the issue and issues, and certified under the hands of the judge who tries the cause, and returned with the verdict and issues to the Division of the Court of Session or the Lord Ordinary by whom the case was sent to the jury" (*n*). But this power has been very seldom exercised (*o*).[6]

§ 64. There are important differences between the Scotch and English law in questions of variance. In criminal cases in England, it is held that "if the charge be of a felonious assault with a staff, and the proof be of such an assault with a stone; or if a wound alleged to be with a sword be proved to be inflicted with an axe; or if a pistol be stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive ma-

(*i*) See per Lord Justice-Clerk in Henry *v.* Young, *supra*, commenting on 2 Al., 297. (*k*) Per Lord Moncrieff in Paterson *v.* Ritchie, 1848, J. Shaw, 1, commenting on 2 Al., 262. (*l*) See Forbes *v.* Kirk, 1842, 4 D., 1177, *supra*, § 55. (*m*) Corbet, 1828, Syme, 339. (*n*) 59 Geo. III, c. 35, § 9—11 Geo. IV, and 1 Will. IV, c. 69, § 1. (*o*) Compare Hunter *v.* Carson, 1822, 3 Mur., 234, with M. Tweeddale *v.* Ker, 1821, 2 Mur., 572, and Darling *v.* Grieve, 1822, 3 Mur., 94.[6]

[6] Trodden *v.* Sweetman, 1862, 24 D., 1360, *supra*, § 52, note 1.

terial; or if the death averred to have been caused by one kind of poison be shewn to have been occasioned by another, the charge is substantially proved, and there is no variance" (*p*). But in our practice, if the indictment so far mis-described the injury as in most of the cases referred to, without adding "or with some other instrument," or poison, &c., "to the prosecutor unknown," there can be little doubt that the Court would interfere. In civil cases in England, almost every disagreement between the allegation and the proof, except in matters clearly unimportant, used formerly to be fatal (*r*). But in consequence of the delay and injustice arising from this practice two statutes were passed, under which it is competent for the Court or presiding judge, even where there is a material variance, to cause the record to be amended on certain conditions as to costs (*s*). Another difference between the practice in the two countries is, that in England precise proof may in many instances be rendered unnecessary by the form of allegation shewing that the party did not mean to bind himself to it. In such cases sums, magnitudes and the like are averred under a *scilicet* or *videlicet*,—*e.g.*, where a plaintiff declared that the defendant is indebted to him in a certain sum, *to-wit*, £26, being the unpaid balance of a larger sum (*t*).

CHAPTER IV.—OF THE RULE THAT THE SUBSTANCE OF THE ISSUE OR LIBEL MUST BE PROVED.

§ 65. The substance of the issue, or of the libel where there is no issue, must be proved; otherwise the verdict will be held as for the defender. But it is enough that the issue or libel be proved substantially; and it is not necessary that immaterial facts which it embraces be made out. An ambiguous verdict is equivalent to one for the defender; because it lies with the pursuer to prove his case, and to get the jury to find that he has done so (*u*). Accordingly, where two or more criminal charges are laid alternatively, and a general verdict of guilty is returned, as it cannot be discover-

(*p*) Taylor, 184—R. *v.* Oxford, 1840, 9 C. and P., 525, 548—R. *v.* Martin, 1832, 5 C. and P., 128. (*r*) Taylor, 141. (*s*) 9 Geo. IV, c. 15—3 and 4 Wm. IV, c. 42, § 23. (*t*) See 1 Starkie Ev., 454—Taylor, 561—Cooper *v.* Blick, 1842, 2 Ad. and Ell., 915, per Patteson, J. (*u*) Adam Ju. Tr., 285—2 Hume, 442, *et seq.*

ed which of the crimes the jury meant to find proved, the panel must be acquitted (*v*).[1] But in civil cases the Court allow a new trial where an ambiguous verdict is returned (*w*).[2] The Court will not listen to an objection of this nature, which is based on a captious or hypercritical construction; but will sustain the verdict, if its meaning is clear according to a natural and common sense reading, although it should not be framed with technical precision or strict logical accuracy (*x*).[3] On this account, the verdict of "not proven" in a civil case is equivalent to a finding for the defender, although properly such verdicts are confined to criminal cases (*y*).[4] It was mentioned in a previous paragraph, that an ambiguous verdict may be amended from the notes of the judge who tried the case (*z*); but this principle is of too recent introduction to have yet been expiscated by decisions.[5] When the jury have found a verdict on all the material issues, the presiding judge may discharge them from making a return on issues which he considers immaterial (*a*).

§ 66. What is the substance of the issue depends on the nature and circumstances of the individual case. The following decisions will illustrate the views of the Court on the point. If a party libels unnecessarily that a deed is onerous, he is not bound to prove oner-

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(*v*) Watt, 1824, Sh. Cr., 128—M'Lachlan *v.* Baird, 1825, 2 Hume, 442—Sinclair, 1825, Sh. Cr., 138. But see Reeves, 1843, 1 Broun, 612. In Brodie *v.* Johnston, 1845, 2 Broun, 559, where a verdict of guilty of stealing "a part of the articles" was returned in a charge of stealing several articles enumerated, the Court held that sentence might pass on the verdict. But in Allan *v.* Baird, 1844, 2 Broun, 294, a conviction and sentence forfeiting "a tin measure," where two were found in possession of the panel, and were both produced, was held ineffectual.[1] (*w*) As in Inglis *v.* Robertson, 1841, 4 D., 342, 902.[2] (*x*) Lawson *v.* North British Rail. Co., 1850, 12 D., 1250.[3]

(*y*) Walker *v.* Ritchie, 1836, 14 S., 1128—Morris *v.* Morgan, Nov. 1853, *in pendente.*[4] (*z*) § 50. (*a*) In Clark *v.* Spence, 1825, 3 Mur., 472, 481, the Lord Chief Commissioner observed that this might be done of consent. In the English case of King *v.* Johnson, 1839, M'L. and Rob. Ap. Ca., 1, it was considered by the House of Lords to be quite clear that consent of parties is not required.

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[1] Jones *v.* M'Ewan and Mitchell, 1853, 1 Irv., 334, and Kirkaldy, 1850, 1 Irv., 333, note.

[2] Morgan *v.* Morris, 1858, 3 Macqueen, 323.

[3] Lenaghan *v.* Monkland and Iron Steel Co., 1857. 19 D., 975.

[4] Not proven is a competent verdict for the defender in a civil cause; Morgan *v.* Morris, 1855, 2 Macqueen, 342.

[5] The law appears to be, that if the verdict be rightly returned by the jury, an error in writing out the verdict may be amended; but if a jury return an ambiguous verdict, and if that verdict be received by the judge, the only remedy is a new trial; Morgan *v.* Morris, *ut supra.* See ante, § 50, note 6.

osity (*b*). In a question of usage of trade a party averring invariable custom succeeded, although he proved a custom usual but not invariable (*c*). Under an issue whether a transaction was entered into without value or consideration, the party maintaining the contract will succeed if he proves a fair onerous consideration, although it may not be full and adequate value (*d*). The case of Cairns *v.* Marianski, before noticed (*e*), illustrates the application of the rule to an issue of facility and impetration. Where damages were claimed under an issue whether the pursuer's lands were inundated in consequence of the insufficiency or improper construction of a bridge, a verdict finding that "the bridge was insufficient, and assessing the damages at £200" was held good, although it was objected that it did not deduce the damage from the insufficiency as an effect from a cause (*f*). Under an issue whether the defender had induced the pursuer to purchase bank stock from him by false and fraudulent concealment "as to the credit and solvency of the bank," the pursuer is not bound to prove that the bank was actually insolvent at the date of the purchase (*g*). In such a case, not only must it be shewn that the false statement was made, but there must be proof, or ground for presuming, that the other party relied on it as an inducement to the contract (*h*). In an action of damages for wrongous imprisonment, the pursuer must prove injury or damage, and may not stand merely on the irregularity (*i*).[6] Not only sexual connection, but the use of seductive arts on the part of the defender, must be proved in an action of damages for seduction (*k*). Where the knowledge of a party himself is in issue, the

(*b*) Hamilton *v.* M'Ghie, 1828, 7 S., 140—see next note. (*c*) Burbidge *v.* Sturrock, 1832, 10 S., 520. In such cases the expense occasioned by the unnecessary averment is laid on the party who made it. (*d*) Hastie & Co. *v.* Warden & Son, 1848, 11 D., 240—See also per Lord Cottenham in Stewart *v.* Stewart, 1842, 1 Bell's Ap. Ca., 796, 816, affirming 11 S., 327. (*e*) Cairns *v.* Marianski, 1850, 12 D., 1286; *supra*, § 50. (*f*) Lawson *v.* North British Rail. Co., 1850, 12 D., 1250.

(*g*) Keith *v.* Smart, 1832, 10 S., 514. (*h*) M'Lellan *v.* Gibson, 1843, 5 D., 1932. See also Burnes *v.* Pennell and Others, 1849, 6 Bell's Ap. Ca., 541.

(*i*) Beattie *v.* M'Lellan, 1846, 8 D., 930—See also Clark *v.* Thomson, 1816, 1 Mur., 187—Collins *v.* Hamilton, 1837, 15 S., 895. (*k*) Stewart *v.* Menzies, 1837, 15 S., 1198.

[6] The law here stated seems open to question. Where in an action of damages for wrongous imprisonment, the pursuer got a verdict with nominal damages, he was held entitled to expenses; Ross *v.* M'Vean, 1860, 22 D., 1144. "It is a wrong to any one to use the diligence of the law against his estate without legal warrant, be the consequences of that illegal act what they may;" *per* Lord Justice-Clerk (Inglis) in Meikle *v.* Snedden, 1862, 24 D., 728.

knowledge of his agent, although relevant evidence, is not full proof (*l*).

§ 67. Fraud, wrongful intention, malice, and the like, are of the substance of issues which embrace them.[7] Accordingly, in an action by a tenant against his landlord, the issue whether the defender had made a "false and fraudulent" representation to the pursuer as to the extent of the farm was held to be negatived by a verdict finding that he had done so "falsely but not fraudulently" (*m*).[8] The defender was assoilzied where the issue was whether a certain insurance "had been effected on a fraudulent over-valuation of the machinery with the intention of destroying the same by fire," and the jury found it had been effected on a fraudulent over-valuation, but not with that intention (*n*). Here, however, the insurance company were obliged to take an issue in that form, because they were attempting to reduce a decree-arbitral which had been pronounced against them. If the action had been at the instance of the insured for payment of the loss, the issue would have been entirely different (*o*). Under an issue whether the defender had failed to advance all or any part of the sum of £1000, in terms of a certain agreement, and whether he wrongfully retained all or any part of certain bills, &c., to the loss and damage of the pursuer, a verdict which found that the defender had failed to advance part of the £1000, but which was silent as to the wrongful retention, was held not to affirm the issue; and a new trial was ordered (*p*). Where one who had acted as executor for a certain person, was

(*l*) Balfour *v.* Lyle, 1832, 10 S., 853, 11 S., 906. (*m*) Balmer *v.* Hogarth, 1830, 8 S., 715. The only ground of action was fraud. If the facts found by the verdict had been relevantly averred, they would have sustained a decree. Accordingly the judgment reserved to the pursuer to bring a new action. (*n*) Hercules Ins. Co. *v.* Hunter, 1837, 14 S., 147 and 1137, 15 S., 800. (*o*) Per Lord Moncrieff in 14 S., 1140, and per Lord Meadowbank in 15 S., 802. (*p*) Inglis *v.* Robertson, 1841, 4 D., 902.

[7] In actions of damages for slander in legal pleadings, it must be put in issue whether the alleged libellous statements were inserted in the pleadings maliciously. This is the settled general rule of practice, but if the pursuer can shew that the statements are impertinent to the question raised by the pleadings, he may be entitled to a verdict without proving malice; Mackellar *v.* Duke of Sutherland, 1859, 21 D., 226.

[8] In answer to an issue whether the pursuer had been induced to purchase bank stock by the false and fraudulent representations of the defenders, the jury returned a verdict that the pursuer had been induced to purchase the shares by the false representations of the defenders, but that these representations were not fraudulent. The verdict was held to be for the defenders, although the jury explained that they meant it as a verdict for the pursuer; Dobbie *v.* Johnston and Russell, 1861, 24 D., 1139.

called upon by the executor under a later will to account for his intromissions, and the issue was whether the defender, knowing or believing in the existence of the later deed, "wrongfully retained possession of the deceased's effects," and the jury found that he had acted "blameably" in not communicating information which he had received regarding the existence of the later deed, the Court held that the verdict fell short of the issue (*r*). The question has been raised, whether under an issue of fraud it is necessary to prove moral fraud (*s*). It has been decided that under issues of facility, fraud, and lesion, it was not held necessary that moral fraud, or specific acts of contravention should be established, and that it is enough if, looking to the circumstances of the granter, there were used persuasions which he was not in a condition to resist (*t*).

§ 68. The principle thus noticed, however, applies only where the fraudulent or illegal nature of the act is left to the jury. If it is a legal inference from the facts averred, the verdict will stand: if it finds these facts to be proved, although it does not also find the consequent fraud or crime. For example, where the issue was whether the defender had fraudulently purchased certain heritable property, knowing that it had been previously sold to another person, and the jury returned a special verdict finding the facts in issue, but without the word fraudulently, the Court held it to be a verdict for the pursuer, because fraud was the necessary legal inference from these facts, which constituted the crime of stellionate (*u*).[10] On the same principle, in ordinary cases of defamation the pursuer is entitled to a verdict with damages, if he proves that the slander was uttered by the defender, although he does not shew that it was either false or malicious, because these are presumed from the uttering (*v*).[11] But in privileged cases, where the presumption on these points is in favour of the defender, the pursuer must prove the falsehood and malice (*x*), even where malice seems

(*r*) Cleland *v.* Weir, 1848, 10 D., 924. But it was held that the accounting must proceed in terms of the verdict. (*s*) Miller *v.* Geils, 1848, 10 D., 715.

(*t*) Clunie *v.* Sterling, 1854, 17 D., 15. See also Smith *v.* Anderson, 1849, 9 D., 710.[9] (*u*) Foggo *v.* Craise, 1840, 2 D., 1379.[10] (*v*) Allardyce *v.* Robertson, 1830, 4 W. S., 118, per Lord Wynford—Ewing *v.* Cullen, 1833, 6 W. S., 578, per curiam—Craig *v.* Marjoribanks, 1823, 3 Mur., 35—Sh. Dig., ii, 1200, and iii, 423.[11]

(*x*) Marianski *v.* Henderson, 1841, 3 D., 1036—Adie *v.* Gowans, 1847, 9 D., 495—M'Intosh *v.* Flowerdew, 1851, 13 D., 726. See also cases in preceding note.

[9] In a reduction on the grounds of facility, fraud, and circumvention, the pursuer is bound to put in issue only fraud *or* circumvention; Mann *v.* Smith, 1861, 23 D., 435.

[10] Morrison *v.* Somerville, 1860, 23 D., 232.

[11] Mackellar *v.* Duke of Sutherland, 24 D., 1124.

to be inferable from the expressions themselves (*y*).[12] The same principle is illustrated by the celebrated case of the King against Woodfall; where the charge was printing and publishing a seditious libel signed "Junius," and it was held that the verdict "guilty of printing and publishing *only*," did not amount to a conviction, because some of the jury might have meant not to find the whole sense and meaning put on the innuendoes proved (*z*).

§ 69. On the other hand, fraud or criminal intent is not essential to the verdict, unless it be essential to the cause. And in some cases a verdict negativing a criminal intent will not be equivalent to a verdict of acquittal, but will stand as a conviction of a minor charge. Thus in a reduction of a bond of caution, where the issue was whether the pursuer had been induced to subscribe the bond "by undue concealment on the part of the defenders," the Court of Session held that a deliberate and intentional withholding of facts must be proved; but the House of Lords reversed this judgment, on the ground that the question involved was the concealment, and that the motive or intention was wholly immaterial (*a*). A question of this nature recently arose in an important criminal cause, where the charge was sedition, by using at certain meetings language "intended and calculated to excite popular disaffection, commotion, and violence and resistance to lawful authority," and the prisoners were found guilty of sedition, in so far as they used language "calculated to excite popular disaffection and resistance to lawful authority." After a very full discussion, this was held a good verdict of sedition, to which crime the intention libelled was not essential, although, if it had also been found, it would have

(*y*) M'Neil, 1776, 5 Sup., 573—Allardyce *v.* Robertson, *supra.* (*z*) R. *v.* Woodfall, 1770, 5 Burr., 2661. So in an action in England for words ("*pur parolles*") where the defendant pleaded not guilty, and the jury found "*quod locutus est verba*," it was held that this verdict was imperfect, and that the plaintiff could not have judgment; 1 Siderfin, 234—Adam Ju. Tr., 232. See also Kennedy *v.* Allen, 1848, 10 D., 1298.

(*a*) Railton *v.* Mathews, 1844, 6 D., 536, reversed 3 Bell's Ap. Ca., 56. See also Forbes *v.* Edinburgh Assur. Co., 1832, 10 S., 451. With these cases compare Balmer *v.* Hogart, *supra*, § 67 (*m*).

[12] Proof of the general disposition of mind of a defender, at the time of the defamation, or other act on which an action of damages may be founded, may be sufficient to satisfy the onus on the pursuer to prove malice; M'Donald *v.* Ferguson, 1853, 15 D., 545. So in an action of damages for the defender having called the pursuer a thief, where the defence was that the defender was acting in an official capacity and was making inquiry about stolen money, the pursuer had to take an issue of malice, but it was observed that proof that the defender, in calling the pursuer a thief, went beyond his official duties, might be proof of malice; Blackett *v.* Sang, 1854, 16 D., 989, and 26 J., 455.

aggravated the offence (*b*). The same principle is illustrated in trials for murder, in which the jury may negative the murderous intent and return an effectual verdict of culpable homicide (*c*).

§ 70. Upon the same principle, when a party is responsible for the actings of another, it is not necessary for the jury to find that he took part in them. Thus, under an issue whether the defender "wrongously, illegally, and oppressively imprisoned the pursuer in a certain safe or cell," &c., it was proved that the pursuer had been ill-treated by certain soldiers to whose custody the defender had committed him; whereupon the jury found for the pursuer, on the ground of the defender's perfect knowledge at the time of the confinement, but "did not find" that he was present either when the pursuer was put in or when he was taken out; and they assessed the damages accordingly. This was held a good verdict for the pursuer, on the ground that the defender was responsible for the persons who did the wrong (*d*).

§ 71. Where a completed act is in issue, a verdict which only finds that it was intended to be done is insufficient; as, where in a charge of murder or theft a verdict of guilty of intent to commit the crime is returned. Nor is a verdict finding a one-sided intention enough when mutual intention is required by the issue. Thus in a question of prescriptive right to harbour dues, where the issue was whether the pursuers under a certain title had for the prescriptive period levied the dues, the verdict that they had done so "in assertion of their right," was held to be for the defender, as the issue meant, whether they had done so "in exercise," and not merely "in assertion," of their right, and the judge had directed the attention of the jury to the distinction (*e*).

§ 72. In many cases, especially in actions of damages, the question whether the substance of the issue is proved is important only in determining the liability for expenses. In actions for defamation the pursuer is almost invariably held to have succeeded and to be entitled to expenses, if he has got a verdict, although only nominal damages (*e.g.*, one shilling) are awarded; because his object was to clear his character; which he has done under such a verdict (*f*). But the Court are not tied up absolutely as to

(*b*) Grant and Others, 1848, J. Shaw, 62. The presiding judge called the attention of the jury to the distinction they had drawn by leaving out the words "and intended;" and ascertained that they had done so purposely. (*c*) *Supra*, § 59.

(*d*) Ross *v.* M'Bean, 1845, 8 D., 250. (*e*) Mag. of Campbelton *v.* Galbreath, 1844, 7 D., 220, 255. (*f*) Gardner *v.* M'Kenzie, 1846, 8 D., 859—Lady Hamilton *v.* Stevenson, 1822, 3 Mur., 86—Lane *v.* Matheson, 1841, 3 D., 434—Young *v.* Cleg-

this rule, so as to be deprived of all discretion in the matter (*g*). Accordingly, in one case of defamation, where the defender justified on the *veritas convicii*, and the jury gave only nominal damages, the Court refused expenses to the pursuer, apparently on the ground that the jury meant to attach a stigma to her character (*h*). But this decision is not of much weight, as the Inner House were divided two to one, and the Lord Ordinary agreed with the minority.[13]

§ 73. In an action by an engineer for payment of his account, where the defender took a counter issue of want of skill, and the jury found for the pursuer, but assessed the amount at one-fourth of what he claimed, the Court found the pursuer entitled to modified expenses; and, in consideration of the injurious nature of the defence, refused to make the modification proportional to the three-fourths of the sum claimed, being the portion which the jury had disallowed (*i*). On the other hand, in actions for reparation of patrimonial loss, where the pursuer gets only nominal damages, he is held to have failed, and not to be entitled to expenses (*k*). This generally holds even in actions of damages for assault; which, although involving injury to the feelings, are brought for recovery of pecuniary compensation, and not in order to clear character (*l*). In one case of invasion of personal liberty, a verdict for the pursuer with only nominal damages carried expenses in his favour (*m*); whereas in a similar case, a verdict finding that the defender (a criminal officer) was chargeable with gross dereliction of duty, but not giving any damages against him, was held to entitle the de-

horn, 1832, 10 S., 248—M'Intosh *v.* Flowerdew, 1851, 14 D., 133—Rae *v.* M'Lay, 1852, 15 D., 80—Shand, 1028. (*g*) Rae *v.* M'Lay, *supra*. It was here observed that, in determining whether there is ground for refusing expenses, the Court will be mainly guided by the opinion of the judge who tried the case. (*h*) Mason *v.* Tait, 1851, 13 D., 1283. (*i*) Gunn *v.* M. Breadalbane, 1849, 12 D., 404.

(*k*) Paterson *v.* Walker, 1849, 11 D., 1085. (*l*) Strachan *v.* Monro, 1845, 7 D., 998—Muckarsie *v.* Dickson, 1848, 11 D., 164—Ewing *v.* E. Mar, 1852, 14 D., 330.

(*m*) Cowan *v.* Campbell, 1833, 12 S., 221. This was a case of wrongous apprehension and imprisonment.

[13] In Duncan *v.* Balbirnie, 1860, 22 D., 934, where the jury returned a verdict for the pursuer and assessed the damages at One Shilling, no expenses were given. But in Balfour *v.* Wallace, 1853, 16 D., 110—Faulks *v.* Park, 1854, 17 D., 247—Arrol *v.* King, 18 D., 98—a verdict for the pursuer with nominal damages was held to carry expenses. In Faulks *v.* Park there had been a tender of a sum larger than that found due. These were all actions of damages for defamation. The general rule is, that a verdict for the pursuer with nominal damages carries expenses; but the rule is not absolute or inflexible; Arrol *v.* King, *supra*—Duncan *v.* Balbirnie, *supra*.

fender to expenses (*n*). Expenses would probably be given in a case of assault, where the nature of the attack and the status of the parties shewed that the defender meant it as an insult (*o*).[14]

In actions laid upon contract, it will depend on the circumstances of each case which party is to be held as successful and entitled to expenses (*p*).

§ 74. The general verdict of guilty in criminal cases means guilty of all the charges as libelled (*r*), although they may be laid as "the crimes libelled, or one or more of them" (*s*). Verdicts of "guilty art and part," and "accessory art and part," are also good verdicts of conviction (*t*). Baron Hume thinks that a verdict of guilty not of the crime but of the pains of law is insufficient, as these are not within the province of the jury; but that a verdict finding special facts which amount to the crime charged, and also finding the panel liable to the pains of law, will be a good verdict, as the Court may disregard the addition (*u*).

(*n*) Ross *v.* M'Bean, 1845, 8 D., 250. The pursuer here had been improperly confined in a safe or cell. (*o*) See opinions of Court in Strachan *v.* Monro, and Muckarsie *v.* Dickson, *supra*. In such cases merely nominal damages might shew that the jury did not take this view of the assault; see Ewing *v.* E. Mar, *supra*.

(*p*) Cases in Sh. Digest, *voce* "*Expenses*," § 203, *et seq.* (*r*) 2 Hume, 442—2 Al., 644. (*s*) M'Haffie, 1827, Syme, App., 43—1827, Syme, 295.

(*t*) 2 Hume, 441—2 Al., 644. (*u*) 2 Hume, 443. Baron Hume mentions instances in which "guilty of the pains of law" has been sustained.

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[14] In an action for wrongous imprisonment, a pursuer, who got a verdict but with nominal damages only, was held entitled to his expenses; Ross *v.* M'Vean, 1860, 22 D., 1144. Where, in an action of damages for breach of promise of marriage, the jury found for the pursuer and assessed the damages at twenty shillings, the pursuer had expenses. In Macfarlane *v.* Lowis, 1858, 21 D., 107, an action of damages for injury to property, where the jury assessed the damages at five shillings, the Court refused to give expenses. See on the practice of the Court as to expenses when a pursuer is found entitled to a sum much less than he demands; Edmond *v.* Main, 1854, 26 J., 442—Paterson *v.* Wallace, 1855, 17 D., 982—Braidwood *v.* Hunter, 1856, 18 D., 574.

TITLE IV.

OF THE RULE WHICH REQUIRES THE BEST EVIDENCE.

CHAPTER I.—OF THE RULE GENERALLY.

§ 75. In general a party must adduce the best attainable evidence of the facts he means to prove (*a*). This rule is founded on the presumption, that one who tenders the less trust-worthy of two kinds of proof within his reach, does so in order to produce an impression which the better proof would not create; for, if they would lead to the same result, he would probably not select the less convincing of them. The rule is also designed for preventing trials from being burdened with unnecessary investigations into the authenticity of secondary proofs; by which the time of the judge and jury would be wasted, and their attention might be diverted from the real points in issue. The rule is thus directed to the specific character, not to the strength or amount, of the proof. It excludes evidence, the substitutional nature of which implies that more original evidence can be obtained.[1] But it does not require each fact to be proved by the greatest attainable amount of evidence; for all proof beyond what will satisfy the jury is superfluous and unnecessary; and it must be left to the party to determine what amount of evidence is sufficient for that purpose. The rule is chiefly directed against the admission of hearsay evidence, and of copies or parole of the contents of documents; these all inferring the existence of more original proof of the facts which they set forth. The excep-

(*a*) Burnett, 598—Bell's Pr., § 2258—2 Al., 505—1 Starkie, 500—1 Phil., 417—1 Greenl., 108—Taylor, 280.

[1] Thus letters written by parties who may be examined as witnesses, are not evidence at all of the facts stated in them. They can be used only by putting them in the hands of the writer in the witness box to refresh his memory. The Court, for this reason, refused to grant diligence for recovery of such documents; Livingstone *v.* Dinwoodie, 1860, 22 D., 1333.

tion by which these secondary proofs are admitted, when the original witness has died, or the original document has been lost, tends to illustrate the general rule; because the circumstances under which they are admitted shew that the party did not select inferior evidence in order to mislead the jury.

§ 76. This rule does not make it imperative on a party to bring forward the most convincing of all his attainable means of proof; it only requires him to adduce evidence, which in its own character is primary and not substitutionary. For example, "in a case of a claim for debt, the creditor may have the benefit of written correspondence and the entries in the debtor's books; and he may have a bill or bond. Can it be said that if, for some reason best known to himself, he puts his case on the general obligation, as inferred from the correspondence and books of his adversary, and proves it, a verdict must go against him because he did not found on the bill or bond? The answer is obvious, that the party who holds these separate modes of proving his case by evidence all primary and admissible in itself, may take any one he chooses, and cannot be impeded in that course by the co-temporaneous evidence of another open to him, and which might have been easier. No doubt, if the defender says that the agreement or obligation was embodied in a written contract, and that that contract, if produced, would be found to affect the issue, that is quite relevant. But on that supposition the written contract is made part of the defender's case. It would lie on him to produce it, and not on the pursuer"(*b*).

§ 77. Accordingly, although each channel of investigation must, so far as possible, be traced to its fountain-head; yet where there are independent sources of information, evidence proceeding from any one of them is admissible, provided more original evidence from the same source cannot be obtained; and the competency of the evidence tendered is not affected by the existence of better evidence from some other source which is still unexhausted (*c*). This principle was well brought out in a recent case, as to whether a bank, which had advanced money to four joint-adventurers on their bill, had agreed to hold, as a special security, shares of the bank stock standing in the names of two of the joint-adventurers. The other two adventurers having, in order to prove the agreement, adduced both parole and written evidence, including a letter of their

(*b*) Per Lord Fullerton in Thom *v.* North British Bank, 1850, 13 D., 143, *infra*, § 77. The existence of the more direct evidence was not discovered until the trial had proceeded some length. (*c*) Greenl., 110—Taylor. 282.

own, which stated that they inclosed a "letter of undertaking" from the bank; the bank called on the presiding judge to direct the jury that the letter of undertaking, being the best proof of the averment, required to be produced or accounted for, before the secondary proof could be entertained. His Lordship having refused to do so, the Court sustained his ruling, on the ground that it was not proved that the letter of undertaking embodied the agreement in issue, and because, although it did, the evidence adduced was competent (*d*). On the latter point, Lord Fullerton observed, "It is a manifest abuse of terms to say that this is secondary evidence. It is a connected series of primary evidence; because each element of it is primary evidence, and the best evidence of each particular fact or circumstance which it has been brought to establish. The whole proof thus composed does not lose its primary character, merely by its being shewn that the agreement might have been more easily proved in another way."

§ 78. Upon the same principle, in an action for reparation of damages sustained by the pursuer in business in consequence of certain acts of the defender, the pursuer having adduced two witnesses, who had not any particular acquaintance with his affairs, but spoke generally to his business having fallen off after the acts complained of, their evidence was allowed to go to the jury, although it appeared that the pursuer had a book-keeper, who was not examined. But the inferior and unsatisfactory nature of the evidence so adduced was one of the considerations which induced the Court to grant a new trial (*e*). This case well illustrates the principle, that while evidence of a primary character will not be rendered inadmissible, its credibility may be materially affected by the existence of better evidence from another source; and that the Court will grant a new trial, if they are satisfied that the jury have erred in consequence of having placed too much reliance on the inferior evidence adduced before them.[2]

§ 79. On this principle also, circumstantial proof is not rendered inadmissible by there being an eye-witness to the fact, who has not

(*d*) Thom *v.* North British Bank, 1850, 13 D., 134. (*e*) Snare *v.* E. Fife's Trustees, 1852, 14 D., 895.

[2] When the Court thought that the evidence on which a verdict had been obtained was unsatisfactory, and when the evidence of the principal witness had been taken on commission abroad, the Court granted a new trial, chiefly because the principal witness had returned to the country and might be examined before the jury; Stewart *v.* Macfarlane, 1856, 18 D., 786.

been examined. But his unexplained absence will be matter for the jury to consider in weighing the proof adduced (*f*). Such absence, however, is unimportant where the party has a legal presumption in his favour; because one so situated is entitled to a verdict in the absence of contrary proof.

§ 80. In criminal trials for forgery, the party whose signature is said to have been fabricated, is in general a necessary witness, because the jury should not be deprived of the most convincing proof of the charge, and the absence of such a witness could seldom be supplied by circumstantial evidence (*g*).[3] But it is not certain whether in a charge of forgery of the subscription of a banking company, every one of the partners who use the firm signature must be examined, or whether the fabrication may not be proved by the bank officers acquainted with all their subscriptions. On the one hand, an official who is daily accustomed to observe and to pass the signatures of the several partners, is familiar with them all; whereas, in general, each of the partners can only speak with confidence as to his own. The professional accuracy of such officials, and their freedom from the bias of interest, also make their evidence trust-worthy; while the great inconvenience which would often result from requiring every one of the signing partners to attend at the trial, makes that course inexpedient. On the other hand, the characteristics by which a subscription is identified may be so completely destroyed by many causes,—as a bad pen, a shaking hand, an uncomfortable posture, illness, hurry, and the like,—that those best acquainted with the person's handwriting would not recognise it. From such causes the evidence of mere opinion as to the forgery might be fallacious; and if it were relied on, a conviction might be obtained of a crime which was not committed by any one. The inconvenience attending a full proof of the fact does not seem to be a sufficient reason for risking such a result. Mr Alison mentions a case (*h*) where a clerk acquainted with the signatures of the partners of Sir W. Forbes's bank was admitted to prove a forgery of the signature of that firm, without any of the

(*f*) Burnett, 561—2 Al., 505. (*g*) 1 Al., 411—2 Al., 508. (*h*) Smith, 1827, 1 Al., 411. The absence of a report of the circumstances of this case impairs its value as a precedent.

[3] In a trial for forgery, where the persons whose names were said to be forged, were abroad and refused to attend as witnesses, evidence of persons who knew their signatures, and deponed that the signatures in question were forgeries, was admitted, and the panel was convicted; Lord Advocate *v.* Wilson, 1857, 2 Irv., 627.

partners having been called. But this decision, which was pronounced on circuit, cannot be held to fix the law on so important a point. Afterwards, in a trial for forging a bank-note, bearing the names of Coventry and Buchan, the prosecutor adduced a teller and a clerk of the bank who deponed that Coventry was dead, and Buchan was confined by illness; that the names of these persons appeared to be engraved, and were positively not their signatures, and that the whole impression was a forgery. Lord Justice-Clerk Boyle thereupon delivered the unanimous opinion of the Court that the evidence of forgery was sufficient in the circumstances of the case (*i*).

More recently, Lord-President Hope held, in a civil trial, that the subscription of a bank officer to a bank account must be proved by the officer himself; and that, as no special reason was given for his non-attendance, his signature could not be proved by another bank officer who was familiar with his handwriting (*k*).

§ 81. From those cases it would appear that there is no general rule, by which one bank officer is admissible to prove the subscription of another, or of one of the partners; but that the Court may in their discretion waive the strict rule in special cases, *e.g.*, where the pretended signature appears on a note which is proved to be an impression from a forged plate. This relaxation ought to be made with greater care in regard to subscriptions occurring incidentally in the course of business, than in case of those written uniformly, like the subscriptions to bank-notes, which are prepared in great numbers at the same time, under similar circumstances, and with the design of uniformity (*l*). It is held in England that the signatures to Bank of England notes may be proved by the clerks familiar with them, without calling the actual subscribers (*m*); and that entries in a banker's books which are open to all the banker's clerks, and daily consulted by them, may be proved by any of them, as well as by the actual writers (*n*).

§ 82. It has sometimes been considered that in cases of improbation of attested deeds it is incompetent to lead proof *comparatione literarum*, without first adducing the instrumentary witnesses (*o*). This question is considered in the chapter on improbation of such documents.

(*i*) Kennedy, 1829, Bell's Notes, 61. (*k*) Bryson *v.* Crauford, 1834, 12 S., 937.

(*l*) See 2 Hume, 395; note. (*m*) Bank prosecutions, Russ. & Ry., 378—2 Russ. on Crimes, 393. (*n*) Furness *v.* Cope, 1828, 2 Moo. & Pa., 197.

(*o*) Fraser *v.* Wilson, 1842, 4 D., 1171, per Lord Justice-Clerk Hope.

A decision already cited (*p*) shews that the handwriting of documents written by persons who were admissible as witnesses under the former law had in general to be proved by them, and could not be proved by persons familiar with their handwriting. It is thought that the recent statutes by which the parties to the cause have been rendered admissible do not make it incumbent on a party to examine his opponent on the authenticity of the opponent's writing; because the adducer's case is a direct contradiction of the evidence which such a witness must be expected to give. There is no reason why a party should not tender himself as a witness on the authenticity of his own handwriting; yet, as the other party may examine him, the Court would probably not regard the withholding of such evidence as fatal to the case, but would leave it as matter for the jury to consider in weighing the evidence.[4]

CHAPTER II.—OF HEARSAY EVIDENCE.

§ 83. Hearsay evidence is testimony delivered by one who depones, not from his personal knowledge of a fact, but from his recollection of what another told him regarding it. It is evidence as to which the jury must determine on the trust-worthiness, not only of the witness examined before them, but also of another person, the real observer of the fact, whose statement they get only at secondhand. Hearsay is thus like the copy of a document, the examination of which involves the two questions, whether it is a correct copy, and what credit is due to the original.

§ 84. By an old and firmly established rule, hearsay evidence is inadmissible (*q*). The reason is, that it is not the best evidence,

(*p*) *Supra*, (*k*). See also Burnett, 501—Edmonstone *v.* Webb, 1801, 3 Esp., 264.

(*q*) Stair, 4, 43, 15—2 Hume, 406—Burnett, 600—Tait, 430. Hearsay was excluded in Balfour's time; Balfour Prac., 381: And the Act 1690, c. 16, rescinded Fletcher of

[4] In trial of an issue whether the defendant had been prevented by the war with Russia from procuring a cargo at Odessa, it appeared that the master communicated with the defendant's agent at Odessa by aid of an interpreter. Held that evidence by the master of what the interpreter (interpreting the agent at Odessa) said to him, was receivable as evidence of what was said by the agent. The ratio of judgment was the great inconvenience to commerce, should it be made necessary, in such cases, to call the interpreters; Reid *v.* Hoskins, 1855, 5 E. and B., 729.

and is not delivered on oath; for the oath of the narrator cannot attach to the original statement that safeguard against falsehood. Besides, the truthfulness, and powers of observation and recollection, of the observer of the fact cannot be tested by cross-examination; the light which his manner would throw upon his testimony is lost; while the fact of his hearsay statement being tendered, instead of his deposition in open Court, creats a suspicion that the latter would not be so favourable to the party.[1]

§ 85. The exclusion of hearsay applies to questions put by the Court and Jury, as well as from the bar (*r*); and its exclusion is *pars judicis;* so that if it has been admitted in a proof on commission, it should be deleted before the proof is read by the Court (*s*).[2]

§ 86. In applying this rule, however, it is necessary to discriminate between those statements which are original evidence, and those which properly fall under the term hearsay. The first rule on this point is, that wherever the fact that a certain statement was made is relevant, independently of the question whether it is true, it may be proved as original, and not hearsay, evidence (*t*). This, indeed, is often the only question in issue, as in cases of verbal slander, verbal contract, perjury, and the like. So, proof that a certain notice or intimation was given is original evidence (*u*). And the report of an architect may be read in order to shew that it was made, but not to prove the facts which it contains (*x*). On the same principle, a letter written to a party, stating that an opinion of counsel adverse to his claim had been received, is admissible to prove the intimation, but not the terms of the opinion (*y*); and a memorial and relative opinion were admitted in order to

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Saltoun's forfeiture, on the ground, among others, that one of the witnesses had deponed *ex auditu.* On this ground also a report made by order of the Court is not evidence so far as it was made on information furnished by others, who have not been examined as witnesses; M. Tweeddale *v.* Brown, 1821, 2 Mur., 565. See also Sheils, 1846, Arkl., 171. (*r*) Spence *v.* Howden, 1719, 2 Mur., 169. (*s*) Morton *v.* Hunters, 1830, 4 W. S., 379, 388.[2] (*t*) Stair, 4, 43, 15—Burnett, 601—Taylor, 371.

(*u*) Spink *v.* Johnston, 1830, 5 Mur., 305—Kerrs *v.* Penman, 1830, 5 Mur., 144—Whitehead *v.* Scott, 1830, 1 Moo. and Rob., 2—1 Phil., 185—1 Greenl., 128, 9.

(*x*) Hatton *v.* Peddie, 1830, 5 Mur., 156. (*y*) Wilson *v.* Glasgow and S. Western Rail. Co., 1851, 14 D., 1.

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[1] The extrajudical statements of a party to a cause may be proved by those who heard them, although the party himself is now a competent witness; Morrison *v.* Somerville, 1860, 23 D., 282.

[2] Clerk *v.* Armstrong, 1862, 24 D., 1315.

shew that the parties, who had consulted the counsel, did not act *in bona fide* in regard to a transaction to which the opinion referred (*z*).

§ 87. On the same principle, proof of character, reputed ownership, notoriety, and the like, although comprehending a number of hearsay statements, is admissible; because the question is—whether the report or repute exists,—not, whether it is true (*a*).[3] Consequently, evidence that a slander was currently reported, although competent in mitigation of damages, may not be used in order to prove the *veritas convicii* (*b*).

§ 88. The conversations of an individual, being the ordinary indications of the state of his mind, his sentiments and disposition, and his feelings towards any one, are admissible as evidence of such facts (*c*). They are not hearsay; because their relevancy does not depend on the truth of the statements which they contain, but on their indicating certain beliefs or feelings in the speaker. Accordingly, while expressions of ill-will uttered by a witness are received when he is objected to on the ground of enmity (*d*), the objection that he was tampered with cannot be proved by persons narrating his statements that he had received a bribe or a promise (*e*). On the same principle, in a question in England as to whether a picture which had been exhibited was meant to be a caricature of certain persons, where it was important to ascertain what impression it had made on the spectators, proof of statements which they had uttered while looking at it was received (*f*). On this principle, also, in questions of pedigree, conversations of the members of the family are admitted, in order to shew whether the claimant was received and treated as a relation (*g*); and counter evidence of the same kind is admitted to shew he was treated as the child of a stranger (*h*).

(*z*) Ewing *v.* Crichton, 1827, 4 Mur., 183. (*a*) Stair, 4, 43, 15—Burnett, 601—Tait, 432—Glassford, 601—1 Phil., 188—Taylor, 371—1 Greenl., 129.[3]

(*b*) Aitken *v.* Reid, 1819, 2 Mur., 148—Scott *v.* M'Gavin, 1821, 2 Mur., 485, 6—Kingan *v.* Watson, 1828, 4 Mur., 490—Paterson *v.* Shaw, 1830, 5 Mur., 279—Macculloch *v.* Litt, 1851, 13 D., 960. (*c*) 1 Phil., 189—Taylor, 372—1 Greenl., 129. See Cairns *v.* Marianski, 1850, 12 D., 1286. affid. 1 Macq., 212. (*d*) As in King *v.* King, 1841, 4 D., 124—Rose *v.* Junor, 1846, 9 D., 12. (*e*) Donaldson *v.* Stewart, 1842, 4 D., 1215. See Mackay *v.* M'Leods, 1827, 4 Mur., 281. (*f*) Du Bost *v.* Beresford, 1810, 2 Camp., 512. (*g*) Douglas cause, 1769, 2 Pat., 146—Townsend Peerage case, May 1843, 79 H. Lord's Journals, 201, *et seq.*—Taylor, 414—1 Phil., 217—1 Greenl., 131. (*h*) Townsend Peerage case, May 1843, 79 Journ. H. Lords, 201, *et seq.*

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[3] The Queen *v.* Inhabitants of Bedfordshire, 1855, 4 E. and B., 535.

§ 89. The same principle is applied in England to actions of damages for adultery, where verbal and written communications which passed between the husband and wife, and their statements to third persons regarding each other, are admissible evidence for both parties, in order to shew the terms on which the spouses lived (*i*). Such evidence seems also to be competent in this country (*k*). But the admissibility is limited to communications and statements before the alleged criminality; because after that time the behaviour of the spouses towards each other must have become altered, and the proof of it is open to the suspicion of collusion or insincerity (*l*).[4]

§ 90. On this principle, also, evidence is received in England of the statements which a patient made to his medical attendant, with regard to his symptoms and sufferings (but not as to their cause); the reason being that such statements are the natural and ordinary expression of co-existing feelings, and are in a great measure the data upon which the medical treatment proceeds (*m*). This principle was applied somewhat liberally in an action by a husband to recover payment of a policy of insurance on the life of his wife. After the surgeon who had attended her had given evidence for the pursuer as to the lady's health, stating that his opinion was founded chiefly on her answers to his questions, the defender was allowed to prove statements which she had made to other individuals on the same subject. The Court considered that this evidence was the best which the case admitted of, and had to be resorted to "from the nature of the thing." But "in strictness such declarations are admissible, not so much as evidence of the confes-

(*i*) 1 Phil. 189, 195—2 Starkie, 354—1 Greenl., 129. Communications between the spouses were admitted for this purpose in Trelauney *v.* Coleman, 1817, 2 Starkie, R., 191, 1 Barn. and Ald., 90 S. C.—Willis *v.* Barnard, 1832, 8 Bing., 376—Elsam *v.* Faucett, 1798, 2 Esp., 562—Winter *v.* Wroot, 1834, 1 Moo. and Rob., 404—Edwards *v.* Crock, 1801, 4 Esp., 39. Their conversations with other persons were received in Jones *v.* Thomson, 1834, 6 C. and P., 415—Willis *v.* Barnard, *supra.* (*k*) See Kirk *v.* Guthrie, 1817, 1 Mur., 275. (*l*) Kirk *v.* Guthrie, *supra*—Milton *v.* Webster, 1835, 7 C. and P., 198—Edwards *v.* Crock, *supra*—Willis *v.* Barnard, *supra*—2 Starkie, 354. (*m*) 1 Phil., 190—Taylor, 372—1 Greenl., 129. It is not settled whether such proof is admissible in this country; see Hall *v.* Otto, 1818, 1 Mur., 443, 4.

[4] In a declarator of marriage founded on averments of cohabitation and habit and repute, held competent to ask witnesses the opinion they formed at the time, from the conduct and conversation of the pursuer and defender, as to the footing on which they lived. But evidence, offered by the pursuer, of statements made by her not in presence of the defender, was rejected; Longworth *v.* Yelverton, 1862, 24 D., 696.

sion of the wife against her husband, as of the actual state of her health in her own opinion at the time." The Court were also a good deal influenced by the evidence being cross to the surgeon's deposition (*n*).[5]

§ 91. When a party's express or implied admissions may be proved against him, evidence of statements made by others in his presence is admissible, with the view of shewing his conduct on the occasion. This kind of proof is constantly admitted in criminal prosecutions (*o*): and it is equally competent, although less frequent, in civil cases (*p*). On this principle, also, where the sufferer in a case of rape had died before the trial, the prisoner was allowed in contradiction of her disposition before a magistrate to prove statements which her husband had made in her presence; because, if she did not contradict them, they were like her own statements (*r*). So where statements by a party's agent are admissible against him, those made by other persons in presence of the agent may be proved, with the view of indicating his conduct on the occasion (*s*). In these cases the statements may be proved by any witness who was present, as well as by the person who made them (*t*). It is thought that in treating evidence of this kind, juries often regard the hearsay statement itself, instead of the relative conduct of the party or agent, which is the evidence properly before them. In order to estimate such proof aright, they would require much more knowledge of the individual's disposition than can usually be obtained (*u*).

§ 92. Statements, which would otherwise be excluded as hearsay, may be proved when they form part of the *res gestae* of acts given in evidence (*x*). The reason is, that words which accompany actions, or which are so connected with them as to arise from coexisting motives, form part of the conduct of the individual; which cannot be rightly understood, unless his words as well as his acts

(*n*) Aveson *v.* Lord Kinnaird, 1805, 6 East., 188, per Grose, J. (*o*) Burnett, 602—2 Al., 518—Bell's Notes, 288—Alexander, 1838, 2 Sw., 110—Moran, 1836, 1 Sw., 231. (*p*) Hall *v.* Otto, 1818, 1 Mur., 444—Forteith *v.* E. Fife, 1821, 2 Mur., 478—Hay *v.* Boyd, 1822, 3 Mur., 13—See Campbell *v.* Macfarlane, 1840, 2 D., 663.

(*r*) Stephens, 1839, 2 Sw., 350. (*s*) Manuel *v.* Fraser, 1818, 1 Mur., 389.

(*t*) Forteith *v.* E. Fife, *supra*, and cases in Notes (*o*) and (*p*). (*u*) On the subject of this section see the chapters on Admissions, *infra*. (*x*) 2 Hume 406—Burnett, 602—2 Al., 517—1 Phil., 201—Taylor, 375.

[5] In an action of damages for wrongous confinement in a lunatic asylum, the private memoranda written by the pursuer when in the asylum were admitted as proof of his state of mind; Macintosh *v.* Fraser, 1859, 21 D., 783.

are proved. In general, also, the actions and the co-relative words are so interwoven, that they cannot be separated without destroying the connectedness and intelligibility of the narrative; whereas experience teaches us that such a dissociation would generally impede the discovery of truth; for coincident words and actions are far more frequently in unison than the reverse (*y*). The admissibility of statements on this ground is determined by the judge according to their connection with the relative facts, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description (*z*). The admissibility usually depends on whether the declarations were co-temporaneous with the facts, and so connected with them as to illustrate their character (*a*); or in legal language, whether the words and acts occured *unico contextu*. Yet it is not necessary that they be co-temporaneous, "for the nature and strength of the connection are the material things to be looked to; and, although concurrence of time cannot but be always material evidence to show the connection, yet it is by no means essential" (*b*). On the other hand, a statement which resolves into a narrative of a past occurrence will not be admitted to qualify or explain it (*c*). The application of these principles will be seen from the following cases.

§ 93. In trials for rioting, proof of the cries of the mob is admitted in order to show its purpose and character (*d*); and expressions used by any one of several persons engaged in an unlawful undertaking (provided they are in furtherance of the common design), are admissible against the whole in explanation of their

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(*y*) This subject is well illustrated by Mr Greenleaf, vol. i, page 108, *et seq.* Baron Hume (vol. ii, p. 406, note) observes upon it—"very often words uttered to a witness are a substantial point of the *res gestae* told by such witness; are the cause and motive why the witness himself has proceeded to do a certain thing; and he cannot relate truly and intelligently what he did, without mentioning why and how he came to conduct himself in that way. Put the case that John finds James lying wounded and bleeding on the highway, and James tells John that he has been fired at with a pistol and robbed, and that the robber is dressed so and so, and has robbed him of such and such articles, and has gone off by such and such a road. Now here, if John in consequence pursues by that road and takes a man dressed as has been told him, and on a search the articles mentioned and a pistol bearing marks of being recently fired are found on him, certainly this verbal information from John is a link and circumstance of the fact, is an act in the progress of the business, and equally admissible as the rest of the story."

(*z*) 1 Greenl., 137. (*a*) Greenl., *supra*. (*b*) Per Ch.-Just. Denman in Rough *v.* Great Northern Rail. Co., 1841, 4 Per. and Dav., 691—Taylor, 379.

(*c*) 1 Greenl., 138—Taylor, 380. (*d*) 2 Hume, 407, note—Lord G. Gordon's case, 21 How St. Tr., 542.

acts (*e*). So where one of several prisoners obtained a certain certificate which was founded on as suspicious against them, proof of the statement made by that prisoner on applying for it, was received in exculpation (*f*). Thus also, in a trial for murder, the prosecutor was allowed to ask a witness whether a boy came to his shop and asked for poison, but not whether the boy said he came from Deanside, that statement being held (rather strictly) as not part of his act on the occasion (*g*). So the pursuer in a question of nuisance to his house by a manufactory, was allowed to prove that persons had looked at the house with the view of taking it on lease, but not the reason they had assigned for not taking it (*h*). Where a person was charged with having committed a forgery upon his father, who declined giving evidence for the crown, the prosecutor was allowed to prove that the father, on the document being presented to him, had said it was forged (*i*). But this decision went partly on the declinature, in consequence of which the father was in some measure viewed as if he had been dead. So in an action of damages for assault, where one of two boys who had been on the spot at the time was dead, and the other was not known, the pursuer was allowed to ask another witness whether she heard them make an exclamation at the time, and what the exclamation was (*k*). But this decision probably proceeded on the special circumstances of the case, fully more than on the exclamation being part of the *res gestae*. Again, in a charge of rape aggravated by administering intoxicating drugs, the prosecutor was allowed to ask a witness whether the person who mixed the liquor, and who was not the prisoner, had stated at the time his reason for doing so (*l*). In an English case (*m*), which has been considered authoritative, the statement made by a person on his return home late at night, to the effect that he had been evading the diligence of his creditors, was allowed to be proved in a question whether he had committed an act of bankruptcy. This decision strongly illustrates the prin-

(*e*) 2 Hume, 407, note—1 Phil., 199—Taylor, 381. (*f*) Hunter, 1838, 2 Sw., 12. (*g*) Elder or Smith, 1827, Syme, 121. With this case compare Craigie v. Hoggan, 1838, 16 S., 584 (affirmed on merits, Macl. and Rob., 942), where in an action of declarator of marriage, the defender was allowed to ask a witness what the pursuer's father had stated to him as to his purpose in calling for the pursuer at an inn some distance from home, in which she was living with the defender. But this case was decided on its special circumstances. (*h*) Hart v. Taylor, 1827, 4 Mur., 311.

(*i*) Harvey, 1835, Bell's Notes, 292. (*k*) Ewing v. Earl of Mar, 1851, 14 D., 314, per Lord President Boyle. (*l*) M'Millan, 1833, Bell's Notes, 290.

(*m*) Bateman v. Bailey, 1794, 5 Dur. and East., 512, noticed per Lord Denman in Rough v. Great Northern Ry., 1841, 4 Per. and Dav., 692, and in Taylor, 379.

ciple, that the admissibility of the statements depends on the strength and nature of their connection with the relative act, not on their being co-temporaneous with it.[6]

§ 94. On the same principle, words spoken to a witness which have caused him to take certain steps relevant to the cause, are admitted, *e.g.*, an information which led him to search for the stolen goods, or to apprehend the prisoner (*n*). So in a question of boundaries of a common, the pursuer was allowed to ask a shepherd what directions his master, a former tenant, had given him as to the boundaries; the object being to shew what directions he had acted upon (*o*). But this evidence should be limited to such a short account of the statement as is necessary for making the narrative connected, and in general should not include a repetition of the statement itself. Accordingly, the Court usually requires the prosecutor to put his question thus, "In consequence of something you heard from such a person, did you search," &c.

§ 95. Akin to the principle thus noticed, is that which in criminal cases admits proof of statements made by the injured party *de recenti* after the alleged crime. Such expressions being the natural outpourings of feelings aroused by the recent injury, and still unsubsided, are a consequence and continuation of the *res gestae*, and corroborate the party's evidence for the crown; while on the other hand a discrepancy between his sworn testimony and his statements recently after the alleged offence is a favourable circumstance for the prisoner. On these grounds, such evidence has for a long period been admitted both for the prosecution and defence, after the injured party has been examined (*p*). Thus the prosecutor was allowed to prove the statement which one who had been robbed made an hour afterwards to a person to whose house he came, and whom he roused from bed (*r*). So where an operative had been assaulted, and had vitriol thrown on his clothes for combination purposes, the account given by him immediately after the injury, to the woman with whom he lodged, was received for the crown (*s*). And the prosecutor may examine a police officer upon the complaint made to him *de recenti* by the person robbed,

(*n*) Bell's Notes, 290. (*o*) Hunter *v.* Dodds, 1832, 10 S., 833. (*p*) 2 Hume, 406, note—Burnett, 602—2 Al., 513, 522. (*r*) Macfarlane, 1826, 1 Al., 244. (*s*) M'Kay and Connacher, 1828, 2 Al., 514.

[6] In a trial for murder, violent language by the prisoner toward the deceased, and complaints by the deceased of the prisoner, both within twenty-four hours of the death, were admitted; Lord Advocate *v.* Stewart, 1855, 2 Irv., 179.

but not on statements made by that person on the day of trial (*t*). Nor will a statement be received which was uttered five or six hours after an alleged robbery; because the party's feelings have had time to subside during the interval (*u*). In the same way, the prisoner, in a charge of sheep-stealing, was allowed to ask a witness what the owner of the sheep had said to him while on the road following their track (*x*); but in a charge of robbery he was not permitted to prove statements made five or six hours afterwards by the alleged sufferer (*y*); and in trials for discharging loaded firearms, the Court excluded statements which had been uttered two and three days after the alleged crime (*z*).

§ 96. The law of this country does not recognize the distinction taken in England, by which proof that the injured party stated *de recenti* he had been robbed, or the like, is admitted, while proof that he named the prisoner as the assailant is excluded (*a*), and the details of the statement cannot be proved, except in cross-examination (*b*). Here it is competent to prove the statement as it was made (*c*); although in practice the prosecutor usually confines himself to a general examination upon it, while the prisoner's counsel often enters minutely into its details.

§ 97. In considering the admissibility of this kind of evidence, regard must be had not only to the time which intervened between the alleged offence and the statement, but to the whole circumstances, *e.g.*, the extent and nature of the injury, and the opportunities which the sufferer had of expressing his feelings. For example, while the statement which a party, seriously injured, made at a short interval to the persons he first met should be received, yet if he uttered no complaint, and manifested no symptoms of excitement to them, his statements to other persons, although at no greater interval, should be rejected, because they are the narrative of a previous occurrence, and not the expression of unintermitted excitement (*d*).

§ 98. When applying this principle to cases of rape, and assault with intent to ravish, the Court has admitted a very exten-

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(*t*) Kelly, 1829, Bell's Notes, 288. (*u*) Moran, 1 Sw., 231. (*x*) Mills, 1844, Bell's Notes, 275. (*y*) Moran, *supra*. (*z*) Hardie, 1831, Sh. Cr., 257—Kennedy, 1838, 2 Sw., 214. (*a*) R. *v.* Wink, 1834, 6 C. and P., 397—R. *v.* Osborne, 1842, Car. and Marsh, 624. But see the remarks of Mr Justice Cresswell in the latter case; see also Taylor, 374. (*b*) R. *v.* Walker, 1839, 2 M. and Rob., 212—R. *v.* Osborne, *supra*. (*c*) Authorities in notes to preceding section.

(*d*) See Hill *v.* Fletcher, 1847, 10 D., 7, *infra*.

sive investigation into the injured party's statements (*e*). Complaints made by her at intervals of two days (*f*), and of nearly a month (*g*), have been admitted for the prosecution; while the prisoner has been allowed to prove expressions which she uttered next day (*h*), and to ask whether "any time in April" she had stated that the connection was voluntary (*i*). The reason for this peculiarity is the importance of sifting the woman's whole conduct and explanations regarding the charge, which is easily made in order to restore a lost character or to gratify jealousy; while it is difficult for the prisoner to disprove it, where there has been a voluntary connection.

Yet, while "immediate disclosure is expected, and concealment creates suspicion" (*k*), allowance must be made both for the extreme excitement, sometimes amounting to frenzy, which so terrible an outrage causes in the sufferer's mind, and for her natural reluctance to publish her disgrace (*l*). It is therefore always important to ascertain the footing on which she stood towards the persons she first met, as compared with those to whom she told her story; and her state of health and spirits during the interval, as well as her disposition and character, should also be investigated. Without considerable light on such circumstances the jury cannot estimate aright the value of the woman's subsequent narrative.

In general, the prisoner will not be allowed to prove the contradictory statement, without laying a foundation for it by examining the injured party (*m*). The same principle applies *a fortiori* to the attempts of the crown to support that witness' testimony by proving *de recenti* statements.

§ 99. Evidence of the pursuer's statements *de recenti* has been rejected in civil actions of damages at her instance for assault with intent to ravish (*n*). But in the last case on this point some

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(*e*) 1 Hume, 309—2 Hume, 407, note—Burnett, 554, 602—1 Al., 217, 224—2 Al., 524. See also Stephens, 1839, 2 Sw., 350. (*f*) Grieve, 1833, Bell's Notes, 288.

(*g*) M'Millan, 1833, Bell's Notes, 288. (*h*) Cumming, 1828, Syme, 330.

(*i*) Young, 1823, 2 Hume, 409, note. The date of the alleged crime does not appear. See also M'Millan, *supra*. (*k*) Per Lord Justice-Clerk Boyle in M'Millan, 1833, Bell's Notes, 288. (*l*) A striking illustration of this occurred in the case of M'Millan, *supra*; where the girl's silence had been persisted in for a month, and had only been relinquished on her being threatened with a visit from a doctor; yet the panel was convicted of assault with intent to ravish, and was transported for life.

(*m*) M'Hardie, 1834, Bell's Notes, 288. See also Robertson, 1842, 1 Broun, 152.

(*n*) Maclean *v.* Miller, 1832, 5 De. and And., 270—Hill *v.* Fletcher, 1847, 10 D., 7, per Lord Justice-Clerk Hope. His Lordship observed that there was a difference of

interval had elapsed between the time when she was detected in suspicious circumstances and her statement, which might have been, and probably was, concocted. The decision also went partly on the circumstance that the woman had not been examined; the case having occurred before the late statute admitting party-witnesses. The point may therefore be considered as open in cases where the statement was recent, and where a foundation has been laid for the question by examination of the pursuer.

The admissibility of statements made by the parties *de recenti*, and of those forming part of the *res gestae*, is noticed afterwards.

§ 100. Hearsay evidence is often admitted in criminal cases to prove that a witness had identified the prisoner recently after the crime (*o*). The reason is, that evidence of identification is valuable in proportion to the freshness of the witness' recollection of the person's features and appearance; so that an impression which enables one with perfect confidence to identify a stranger at an interval of a few hours or days will often fade during the weeks or months which elapse before the trial.[7]

§ 101. Until recently the deposition of a witness on oath could not be either supported or contradicted by evidence of his extrajudicial statements, except in the cases mentioned in the preceeding paragraphs (*p*). But a recent statute provides that it shall be competent in any action or proceeding to examine any witness as to "whether he has on any specified occasion made a statement on any matter pertinent to the issue, different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce

opinion among some of his brethren on the bench whom he had consulted upon the point. (*o*) 2 Al., 628. Thus in a charge of horse-stealing from Hart, the prosecutor was allowed without objection to prove by the officer who apprehended the prisoner, that Hart had identified the prisoner on Friday, as the man who stole his horse on the previous Wednesday; Wight, 1836, 1 Sw., 47; Bell's Notes, 288.

(*p*) 2 Hume, 381—Burnett, 463—2 Al., 522—Bell's Notes, 270—Hardie, 1831, Sh. Cr., 237—Wyllie, 1829, Sh. Cr., 223.

[7] When a boy of seven years old was examined as a witness in reference to an alleged murder, subsequent witnesses were asked what the boy had said on the subject within forty-eight hours after the commission of the crime charged. It was objected that the evidence was hearsay and inferior to that of the boy himself; but answered that it was the practice of the Court to admit such evidence, to test the value of the evidence of a witness so young, and to shew what he said *de recenti;* Lord Adv. *v.* Stewart, 1855, 2 Irv., 179. In an action of divorce against a husband, the question whether the alleged paramour (who had been a witness) had, at the birth of her child, said who its father was, was admitted to show the consistency of her statement on the subject throughout; A r. B, 1858, 20 D., 407.

evidence to prove that such witness has made such different statement on the occasion specified" (*r*). The object of this enactment is to prevent a witness who had given contradictory accounts of the same matter from being received as perfectly trust-worthy. The witness must first be cross-examined upon the point; but after that has been done other evidence may be led to prove the contradiction.[8] Of course the party against whom such evidence is adduced may cross-examine the witnesses who speak to the contradictory statement. He ought also to be allowed to prove by other evidence that the statement really made on the occasion does not conflict with that given by the witness on oath; otherwise a party against whom a witness is adduced might select from a number of persons, to whom the statement was made, the only one who took up an erroneous impression of it; and the consequence would be, that its real nature would be misrepresented. But the statute is silent on this point. The rule stated at the commencement of this section subsists except in so far as thus altered by statute. Practically it may be regarded as abrogated.[9]

§ 102. The exceptions hitherto considered from the rule against admitting hearsay, are founded on the nature of the fact to be proved, or the object for which the evidence is tendered. The law of this country also admits hearsay in all cases where the

(*r*) 15 Vict., c. 27, § 8.

[8] Such evidence will be admissible although the witness' deposition and his previous statement be not in direct and absolute contradiction; Jackson *v.* Thomson, 1861, 31 L. J. N. S., Q. B., p. 11—17 and 18 Vict., c. 125, § 22.

Counsel for a prisoner (in a trial for stabbing and riot) proposed to ask a witness (a person said to have been injured by the prisoner) whether, at certain places, the witness had said to two Procurators Fiscal named, that he had received the injuries in question from an individual who was not one of the prisoners; and stated that he meant, by putting the question, to lay a foundation for examining the Procurators Fiscal in contradiction of the witness if necessary; the Lord Justice-Clerk (Hope), on Circuit, disallowed the question; Lord Advocate *v.* O'Donnel, 2 Irv., 286. But in Inch *v.* Inch, 1856, 18 D., 997, evidence by an agent of what a witness had said in precognition was allowed, in contradiction of the evidence of the witness, due foundation having been laid.

In Emslie *v.* Alexander, 1862, 1 Macpherson, 209, Lord Neaves remarked that it was not competent to contradict a witness by proof of what he said on precognition; and the Lord Justice-Clerk (Inglis) said he had often rejected such evidence in criminal cases. It seems competent, however, to contradict a witness by proof of what he said when under examination as a bankrupt; and the notes of his deposition, taken and authenticated by the Sheriff, may be recovered and adduced as proof for that purpose; Emslie *v.* Alexander, *supra.*

[9] The statement in the text seems too absolute.

person whose statement is narrated was admissible when he spoke, but has died before the trial (*s*). The reason is, that such evidence is the best which the circumstances admit of; that there is no ground for suspecting it is tendered for an improper purpose; and that injustice would more frequently arise from excluding it, than from admitting it under a proper direction from the judge as to its credibility. Evidence of this kind is highly trust-worthy when it has been made deliberately under the apprehension of death. But statements which witnesses deceased uttered even in ordinary conversation, and while in perfect health, are equally admissible (*t*).

§ 103. Hearsay of a deceased person, however, will be excluded, if he was inadmissible as a witness when he made the statement (*u*). Accordingly, in a case of filiation, where the pursuer died after a *semiplena probatio* had been adduced, her death-bed statement could not be proved by the oath of her mother, who had been sisted as pursuer. As the original pursuer was not an admissible witness,—the case having occurred before the recent statute (*x*),—her hearsay statement could not be proved after her death; and it was incompetent to take the oath of any other person in supplement of a *semiplena* proof (*y*). The Lord Chief Commissioner once rejected hearsay of a deceased person's opinion as to the mental capacity of a certain individual, which was the question in issue (*z*). It is doubtful whether this decision can be supported, unless the opinion would have been inadmissible as original evidence.

§ 104. Permanent insanity has the same effect as death upon the competency of a witness; and it may therefore be fairly argued, that proof of statements by one so afflicted should be received, if they were made while he was sane (*a*). This view (on which there are no decisions) derives support from two cases already noticed, where the declinature of the witness to depone (*b*), and the

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(*s*) Bell's Pr., § 2259—Burnett, 600—Tait, 431—2 Al., 515—Bell's Notes, 291—D. Roxburghe *v.* Chatto, 1753, Elch. *Witness*, No. 38—E. Fife *v.* E. Fife's Trustees, 1816, 1 Mur., 95—Millar *v.* Moffat, 1820, 2 Mur., 318, 324—Wilson *v.* Jamieson, 1827, 4 Mur., 368—Mackenzie, 1827, Syme, 160—Hunter, 1838, 2 Sw., 1. Hearsay of statements made by a deceased witness is admitted, where a written deposition had been taken from him in presence of a magistrate; Mackenzie, 1827, Syme, 158. See *infra*, § 117. (*t*) Authorities in preceding note. (*u*) Bell's Pr., § 2259—Millar *v.* Moffat, 1820, 2 Mur., 318, 325—Patterson's Trustee *v.* Johnston, 1816, 1 Mur., 74—Tait, 431. (*x*) 16 Vict., c. 20. (*y*) See Dobie *v.* Gaff, 1843, 5 D., 1385.

(*z*) Darling *v.* Grieve, 1822, 3 Mur., 90. (*a*) Bentham Ev., iii, 408—Burnett, 601—Tait, 431. (*b*) Harvey, 1835, Bell's Notes, 292; *supra*, § 98.

inability of the adducer to find him (*c*), partly induced the Court to admit proof of his statements. In another case (of rather old date), certificates by persons imprisoned abroad as captives of war were received, because they were the best evidence that could be got in the circumstances, the witnesses being completely beyond the party's reach (*d*). Severe illness of a witness, however, is not a ground for admitting hearsay of his statements (*e*); the proper course being either to delay the trial, or to examine the witness on commission. Still less will the refusal of one who is abroad to give evidence before a commissioner of Court render hearsay or an affidavit of his statements admissible (*f*). A witness so situated cannot reasonably object to being examined in regular form; and, therefore, admitting secondary evidence of his statements would give opportunities for collusion and cooking up *ex parte* evidence. Hearsay of statements made by a foreigner who had left the country, and whose residence was unknown, was held inadmissible as evidence for a prisoner; and a written statement by another witness in the same situation was also rejected (*g*). So held as to hearsay of statements by a Scotsman who had left the country, or at least whose residence was unknown (*h*).[10]

§ 105. The fact of the witness' death, or insanity,—if that be a ground for admitting hearsay (*i*),—must be established to the satisfaction of the Court before the secondary evidence of his statements will be received. But a *prima facie* proof of the fact will suffice; and the Court in exercise of its discretion may admit hearsay on the point (*j*).

§ 106. The best proof of what a deceased witness said is his deposition taken on commission to lie *in retentis*, or his examination in a previous trial of the cause (*k*). It is doubtful whether

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(*c*) Ewing *v.* E. Mar, 1851, 14 D., 314; *supra*, § 93. (*d*) Ranking of Cleland's Creditors, 1708, M., 12,634. (*e*) Gun *v.* Gardner, 1820, 2 Mur., 196—Stothart *v.* Johnstone's Trustees, 1821, 2 Mur., 541. (*f*) Glyn *v.* Johnstone & Co., 1834, 13 S., 126. (*g*) Cavalari, 1854, 1 Irvine, 564. (*h*) Rouatt, 1852, 1 Irvine, 79.[10] (*i*) See *supra*, § 104. (*j*) Hearsay was admitted where a person deponed he had been at the individual's funeral; Christian *v.* Kennedy, 1818, 1 Mur., 424; and where one deponed that he knew the original witness had been convicted of a capital crime, and had been hanged; Miller *v.* Moffat, 1820, 2 Mur., 325. See analogous cases upon admitting parole proof of lost documents, *infra*, § 157.

(*k*) See this fully considered in treating of the examination of witnesses.

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[10] In England, the Court refused to grant a commission to examine witnesses in Russia, when Russia and England were at war; because to do so, would be to authorise communication with the Queen's enemies; Barrick *v.* Buba, 1855, 16 Scott, 492.

the deposition of one examined as a haver may be used as his evidence *in causa* after his death (*l*). The statements of a deceased witness may not be proved by his precognition taken by the adducer's agent; because such examinations are conducted, not with the view of bringing out a fair statement, but of ascertaining what the witness can say in favour of the party examining (*m*).[11] On this ground a precognition taken with a view to a criminal prosecution and signed by the witness is inadmissible; although such examinations are usually conducted with more impartiality than precognitions by private persons (*n*). In a case of rape, however, the information which the injured party had given to the public officials was allowed to be proved by parole of a person who had been present when she emitted it (*o*).[12]

Voluntary affidavits by persons deceased are not admitted; because they are usually prepared for an *ex parte* purpose, and are open to suspicion of having been collusively dressed up (*p*) for the

(*l*) It was rejected by the Lord Chief Commissioner in Campbell *v.* Davidson, 1827, 4 Mur., 178. (*m*) M'Intosh, 1838, 2 Sw., 103—Ormond and Wylie, 1848, Arkl., 483. (*n*) Cases in note (*m*). (*o*) Stephens, 1829, Bell's Notes, 292—2 Sw., 348. It is not easy to see a sufficient ground for distinction between this case and those in the preceding note (*m*). (*p*) Mag. of Aberdeen *v.* More, 1813, Hume D., 502.

[11] See as to competency of contradicting a witness by proof of what he said on precognition, *supra*, § 101, note 8.

[12] In a trial for murder, the prosecutor offered in evidence, the deposition of a party who had died before the trial, and who was not the party injured. The deposition had been emitted in the presence of the Sheriff and Procurator Fiscal. It was objected for the prisoner that the deposition was inadmissible, because it did not bear to be emitted in prospect of death; and because it was the general rule in criminal practice that all the evidence must be emitted in presence of the prisoner, to which the admission of the dying declaration of the injured person was the only recognised exception. The Court held that there was no ground for distinguishing between the dying declaration of the person injured, and of any other person competent to be a witness; and that the circumstance that the declaration did not bear to be emitted in view of death, formed no objection to its admissibility, and they received the evidence.

In competing petitions for service, aged witnesses were examined on commission. One claimant died; and his son did not represent him, but presented a new petition for service to the common ancestor. Held, in a jury trial between that claimant and the former and surviving claimants, that the latter were entitled to read to the jury the deposition of two of the aged witnesses who had since died. But the Court, in admitting the evidence, were influenced by the fact that, at the commission at which the evidence of these witnesses was taken, the father of the new claimant, who had the same interest as he, was present; Souter *v.* M'Intosh, 1859, 21 D., 885.

occasion; and for the same reason certificates will very rarely be received (*q*), except in ancient matters (*r*).[13]

§ 107. The most common way of proving a deceased witness' statements is by adducing the person to whom they were made, who can be cross-examined as to how the subject was introduced, and the circumstances under which the statements were made. It would seem that a letter or note holograph of the deceased witness may be used (*s*). Such a document however may often be subject to the same objection as his affidavit; while on the other hand, if it was written incidentally, or in answer to questions fairly put, it is much better than ordinary hearsay.[14] Letters written by a deceased member of the family, and a manuscript pedigree compiled by an ancestor of the claimant *ante litem motam*, were received in a peerage case to prove the pedigree, which was ancient (*t*). Where a witness deponed that he had a conversation with a person since dead, during which that person referred to a book to refresh his memory as to a fact otherwise known to him, the Court held that that fact might be proved without producing the book (*u*).

§ 108. In considering the English authorities on these points, it will be observed that the general rule in that country is against

(*q*) Compare Humphreys (*soi-disant* E. Stirling), 1839, Swinton's Rep., 177, and Appx., 86, with Ranking of Cleland's Creditors, 1708, M., 12,634; *supra*, § 104, (*d*).

(*r*) Stair, iv, 43, 5—Tait, 406. (*s*) See Campbell *v.* Davidson, 1827, 4 Mur., 173—M'Alister *v.* M'Alister, 1833, 12 S., 198—Wilson *v.* Kirkwood, 1822, 3 Mur., 205.

(*t*) Crawford and Lindsay Peerage Case, 1842, 2 Cl. and Finn., New Cases, 559, and 13 D. (H. Lords), 32. (*u*) Oliver, 1827, Syme, 224.

[13] Where the clerk to a kirk-session deponed that the moderator, who had since died, had, at a meeting of the kirk-session, made a statement relative to an interview with the defender, which the clerk entered on the minutes of meeting of the session to the dictation of the moderator, and where the clerk deponed to the accuracy of the minute, the Court indicated an opinion in favour of the admissibility of the minute as proof of what the moderator said; but, before deciding the point, directed that the surviving members of the kirk-session who had been present should be examined; A *v.* B, 1858, 20 D., 407.

[14] In a trial for murder, Lord Justice-Clerk (Hope) and Lord Handyside, Lord Ivory dissenting, rejected, as evidence of a fact in the cause, a diary or book of memoranda in the handwriting of the deceased. It was argued that the writing of a deceased was better evidence than hearsay of what he said, and ought to be admitted on the same principle; but the Lord Justice-Clerk observed that there was a great difference; because, when hearsay evidence was received the witness could be examined as to the manner of the deceased when saying the words deponed to, and as to the circumstances in which they were said; but as to the time when jottings were made in a diary, and the motives for making them, there was no proof at all; Lord Advocate *v.* Madeline Smith, 1857, 2 Irv., 641, 647, 662.

admitting hearsay of deceased witnesses, and it is only received in some excepted cases; namely, (1) Questions of pedigree, (2) Questions of public or general interest, (3) Questions regarding ancient possession, (4) Declarations by deceased witnesses against their interest, (5) Dying declarations, (6) Declarations of deceased witnesses made officially, or in the course of their business (*x*).

Hearsay is only admitted in these cases in England when original evidence cannot be obtained. It is therefore unnecessary to notice the rules regarding them; as the admissibility of hearsay of dead witnesses in Scotland is general.

§ 109. The question is still open, whether hearsay of hearsay is admissible when both the original witness and the narrator are dead. It is easy to "conceive a case in the criminal Court where it would be absolutely necessary to receive such evidence, as a murdered man having stated who was the murderer to a person since dead" (*y*); and where the facts are simple and likely to be remembered, such evidence would be credible. On the other hand these are exceptional cases; for in general, hearsay of hearsay would be of no value in evidence, and would be more apt to mislead than assist the jury. This point arose in a case where Lord Pitmilly expressed a clear opinion in favour of the admissibility; but the other judges waived deciding on it (*z*). Recently, however, the present Lord Justice-Clerk[15] held such evidence to be inadmissible upon the propinquity of one claiming a succession (*a*).

In England hearsay of hearsay is admitted in cases of pedigree where both declarants were within the family, and had died before the trial, and where the statements were made *ante litem motam* (*b*). And an ancient pedigree prepared or adopted by an ancestor of the claimant is also admissible, on the presumption that he knew it to be correct, either from personal knowledge, or by information derived from deceased members of the family (*c*).[16]

(*x*) See these noticed in 1 Phillips, 211—Taylor, 392—1 Greenleaf, 168.

(*y*) Per Lord Justice-Clerk Boyle in Smith *v.* Bank of Scotland, 1826, 5 S., 98.

(*z*) Smith *v.* Bank of Scotland, *supra*. (*a*) Morgan *v.* Morris, Nov. 1853, not yet reported. See on this point § 160. (*b*) 1 Phil., 227—Taylor, 416—Doe *v.* Randall, 1828, 2 Moo. and Pa., 20—Monkton *v.* Att.-Gen., 1831, 2 Russ. and My., 147, 166—Slaney *v.* Wade, 1836, 7 Sim., 611, and 1 My. and Cr., 355.

(*c*) Davies *v.* Loundes, 1843, 7 Scott, N. R., 213; 6 Man. and Gr., 527—Slaney *v.* Wade, *supra*—Monkton *v.* Att.-Gen., *supra*—Crawfurd and Lindsay Peerage case, *supra*, § 108.

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[15] The late Lord Justice-Clerk (Hope). The point is not mentioned in any of the reports of the case.

[16] Held in England that the contents of a document cannot be proved by a copy of a copy: Everingham *v.* Roundell, 1838, 2 Moo. and Robb., 138.

CHAPTER III.—OF THE ADMISSIBILITY OF PAROLE PROOF OF THE CONTENTS OF WRITINGS.

§ 110. An important branch of the rule which requires the best evidence is, that the terms of documents which may be produced must be proved by the documents themselves, and cannot be proved by parole evidence (*d*).[1] The reason is, that witnesses are extremely apt, from want of observation or memory, to mistake the terms of writings, the effect of which often depends on their precise words; and that, each document being intended to be read as a whole, its meaning would often be misunderstood if a statement of only a part of it were admissible. Besides, there is ground for suspecting that the party tenders the parole evidence, because producing the document would not be equally favourable to his case.

§ 111. This rule of course applies to all those matters which law requires to be committed to writing, as decisions of Courts of record (*e*), convictions of crimes (*f*), dispositions of heritage (*g*), bills of exchange (*h*), discharges (*i*), and contracts which the parties have stipulated should be in writing (*k*).

And where a document is the official narrative of acts and proceedings which law requires to be so recorded, parole of them is excluded, although they may be simple and easily remembered. The instruments of notaries, and messenger's executions, are (with

(*d*) 2 Al., 508—1 Phil., 421—Taylor, 283. (*e*) Edinburgh Shipping Co. *v.* Ogilvie, 1819, 2 Mur., 137—Dickson *v.* Ponton, 1824, 3 Mur., 440—Greig *v.* Edmonstone, 1826, 4 Mur., 70—Smith *v.* Robertson, 1832, 10 S., 829. See Baillie *v.* Bryson, 1818, 1 Mur., 326; where the record of a Court was allowed to be read by the clerk of that Court, sworn as a witness. (*f*) Miller *v.* Moffat, 1820, 2 Mur., 323—Fraser, 1839, 2 Sw., 436—2 Hume, 355. (*g*) Stair, 1, 10, 9—Ersk., 3, 2, 2, and 4, 2, 20. See the chapter on proving obligations regarding heritage, *infra*. (*h*) M'Nab *v.* Telfer, 1821, 2 Mur., 481—Couseland *v.* Cuthil, 1830, 5 Mur., 149.

(*i*) Cameron *v.* Cameron's Tr., 1820, 2 Mur., 234—Gordon *v.* Miller, 1838, Macf. R., 174. (*k*) Ersk., 3, 2, 4—Bell's Pr., § 25—Tait, 224, 318. See the chapter on proving such contracts, *infra*.

[1] If a letter or private document is to be read to the jury, the whole of it must be read. In that it differs from a public document. "A document which is to be received in respect of its being a public document, returned in pursuance of some Act of Parliament, or the performance of some public duty, is valid for that reason. If any impertinence creeps into it, that is something which does not belong to it, that ought to be excluded, and in truth it is no part of it, and ought not to be read with it;" Milne *v.* Leisler, 1862, 31 L. J. N. S., Exch., 257, *per* C. B. Pollock.

very few exceptions) the only competent proof of their official acts (*l*). And the burgh books have been held necessary in order to prove the election of the magistrates (*m*), or to show who were members of council at any time (*n*). On the same principle the written declaration is the only competent proof of the statements made by a prisoner when examined before a magistrate (*o*).[2]

§ 112. A contract which the parties have reduced into writing cannot be proved by witnesses, although in its own nature it may admit of that kind of evidence. The reason is that the parties having mutually selected the writing as the proof and measure of their contract, its existence and terms are *partes contractus* (*p*). For example, a lease for one year (*r*), and an agreement to aliment a person (*s*), cannot be proved by witnesses; where they have been reduced to writing.[3]

§ 113. On this principle also, where parties have agreed verbally to be bound by the terms of a certain document, parole of its contents is inadmissible, because it was by mutual consent made the measure of their contract, as if they had regularly signed it. Thus in an English case, where a landlord and tenant had agreed verbally

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(*l*) See the chapters on notarial instruments and messengers' executions, *infra*.

(*m*) Gardner *v.* Reekie, 1828, 4 Mur., 438. So in Ogilvie *v.* Magistrates of Edinburgh, 6th Feb. 1810, F. C., it was held that the minutes of a meeting for electing a deacon of an incorporation of a Royal Burgh could not be contradicted by parole; see § 118 (*a*). (*n*) Black *v.* Campbell, 1819, 5 Dow, 23. (*o*) Little *v.* Smith, 1845, 8 D., 265; 1847, 9 D., 787—2 Al., 509, 576. See the chapter on Prisoners' Declarations, *infra*. (*p*) 3 Starkie, 757—1 Greenl., 114—Taylor, 286.

(*r*) Monaghan, 1844, 2 Broun, 131. See also Hutchison *v.* Ferrier, 13 D., 837; affirmed on another point, 1 Macq., 196. (*s*) M'Kellar *v.* Lambert, 1828, 4 Mur., 541.

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[2] But it may be proved by parole evidence that a panel was duly cautioned before he emitted his declaration, and was in his sound and sober senses when he emitted it, although these facts are not stated in the declaration or in a docquet; Lord Advocate *v.* Hay, 1858, 3 Irv., 181—Lord Advocate *v.* Macpherson, 1862, 34 Sc. Jur., 140.

It would appear that evidence cannot be received as to what took place in Court at a jury trial, in contradiction of the notes of the presiding judge; Dobbie *v.* Johnston and Russell, 1861, 23 D., 1139. See § 48, note 4.

The Register of County Voters is conclusive evidence of qualification; 24 & 25 Vict., c. 83, § 42. The Certificate of Incorporation of a joint-stock company is conclusive evidence that all the formalities requisite prior to incorporation have been complied with; 25 & 26 Vict., c. 89, § 192.

[3] The question put to a pursuer, who was a witness, "What was your interest or share in the copartnery between you and your brother?" held incompetent; because it had been proved that there was a written contract of copartnery; Clark *v.* Clark's Trs., 1860, 23 D., 74.

to a lease on the terms contained in a prior written lease between the landlord and a third party, it was held that the document must be produced (*t*). So where a tenant after the expiry of a written lease continues to possess by tacit relocation, the terms of the implied contract cannot be proved without the writing (*u*). And in an action by the secretary of a society against certain of the members for payment of his salary, where the resolution of the committee under which he had been engaged was contained in a book of which the plaintiff usually had charge, it was held that his knowledge of, and acting under, the resolution inferred adoption of it as a written contract, so that he could not prove the terms of his engagement without the book (*x*). On the same principle, in an action for payment of work, where it appears that there had been a written contract between the parties, and the claim is upon an alleged verbal order for extra work relating to the same subject, it is settled in England that the plaintiff must produce the writing, in order to shew whether it includes the work claimed for, and what was the stipulated rate of remuneration (*y*).

§ 114. But the existence of a document, inadmissible from want of subscription, will not exclude parole proof of the contract to which it refers, because it indicates only a proposed, not an actual written agreement (*z*). Yet if *rei interventus* has followed on and validated an informal document, parole of the terms of the contract will be excluded, because the writing is admissible and binding (*a*).[4] Where the written contract cannot be used for want of a stamp, its terms may not be proved by parole; but the writing must be stamped and produced (*b*).[5]

(*t*) Turner *v.* Power, 1828, 7 B. and C., 625, Mo. and Mal., 131, S. C.—The document being on a wrong stamp, was excluded; and a non-suit was directed in consequence; see *infra*, § 114, (*b*). (*u*) Menzies *v.* Duff, 1851, 13 D., 1044—But see Tait, 222. (*x*) Whitford *v.* Tutin, 1834, 10 Bing., 395. (*y*) Vincent *v.* Cole, 1828, Mo. and Mal., 257; 3 Car. and Pa., 481, S. C.—Buxton *v.* Cornish, 1844, 1 Dow. and L., 585—Jones *v.* Howell, 1835, 4 Dowl., 176—Parton *v.* Cole, 1842, 6 Eng. Jur., 370; see *infra*, § 121, (*i*). (*z*) Ramsbottom *v.* Tunbridge, 1814, 2 Ma. and Sel., 434—Stevens *v.* Pinney, 1818, 8 Taunt., 827—Doe *v.* Cartwright, 1820, 3 B. and Ald., 326—Trewhitt *v.* Lambert, 1839, 10 Ad. and Ell., 470. (*a*) See the chapter on *rei interventus* below. (*b*) Hutchison *v.* Ferrier, 1857, 13 D., 837; (approved of in the House of Lords when affirming the judgment on another point, 1

[4] "The rule that you cannot prove the contents of a written instrument by parole, is just as clearly applicable, according to all the authorities, to an instrument that is validated *rei interventu*, as to an instrument that is originally probative;" *per* Lord Justice-Clerk in Clark *v.* Clark's Trustees, 1860, 23 D., 74, 79.

[5] In a late English case the judge held that an unstamped document embodying the

§ 115. Whenever it is material to prove the existence or terms of a document of any kind, and not merely the truth of facts which it records, the document itself must be produced, and parole cannot be substituted for it. This (for example) has been held as to the terms of a correspondence (*c*), and whether it was marked "private" (*d*), as to the written regulations of a market (*e*),[6] written instructions to sailing masters (*f*), and a written opinion of counsel (*g*). So it is incompetent to ask a witness what is the amount of property or legacies in a settlement (*h*), whether a deed contains a clause in certain terms (*i*), or whether a certain vessel is entered in the registry (*k*).

§ 116. On the other hand, where the document is a narrative of facts, its existence will not exclude independent parole proof of these facts (*l*), unless they are formal proceedings or *actus legitimi*, of which an official written statement is required (*m*).[7] Such parole evidence is not tendered in order to prove the contents of the writing, or as a substitute for it; but the two modes of proof are independent sources of information upon the same matter. For example, births, deaths, and marriages may be proved by parole as well as by entries in the parish register (*n*). And where a witness was objected to on the ground of infamy, the party who adduced him was allowed to prove by parole that he had undergone his

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Macq., 196)—Ramsbottom *v.* Mortley, 1814, 2 Ma. and Sel., 445—Buxton *v.* Cornish, 1844, 1 Dow. and L., 585—Turner *v.* Power, *supra*, (*t*)—See also Harold *v.* Pollexfen, 1844, 6 D., 1103. (*c*) Cooper *v.* M'Intosh, 1828, 3 Mur., 358—Gibson *v.* Anderson, 1846, 9 D., 1—Queen's case, 1820, 2 Brod. and Bing., 286, 290. (*d*) Cooper *v.* M'Intosh, *supra*. (*e*) M'Cracken *v.* Pearson, 1821, 2 Mur., 553.
(*f*) Kitchen *v.* Fisher, 1821, 2 Mur., 586. (*g*) Cooper *v.* M'Intosh, *supra*.
(*h*) Rose *v.* Gollan, 1816, 1 Mur., 84. (*i*) Dalziel *v.* D. Queensberry's Ex., 1825, 4 Mur., 14. (*k*) Snadon *v.* Stewart, 1819, 2 Mur., 63. (*l*) 3 Starkie, 786—Taylor, 296. (*m*) *Supra*, § 111. (*n*) 2 Al., 507—Starkie, *supra*—Taylor, *supra*.

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terms of an arrangement, which arrangement was pleaded by the plaintiff, was no better than waste paper; and therefore he allowed parole evidence of the arrangement, and gave judgment for the plaintiff. But the Court of Queen's Bench, on appeal, held that although the document could not be received in evidence, because it was unstamped, yet the existence of it excluded proof by parole, and they quashed the judgment and ordered a new trial; Alcock *v.* Delay, 1855, 4 E. and B., 660.

[6] See Rait *v.* Primrose, 1859, 21 D., 965. See § 122, note.

[7] A notarial protest is not now necessary to prove the presentment and dishonour of a bill or note in order to preserve recourse against the drawer or indorser. They may be proved *prout de jure* to the effect of preserving such recourse; 19 & 20 Vict., c. 60, § 13.

punishment (imprisonment), although the fact was entered in the books of the jail (*o*). So the fact that a witness had stood on the pillory may be proved by parole, although the extract conviction is the only admissible proof that it was for a crime inferring infamy (*p*).

§ 117. On this principle the evidence emitted by a deceased witness in a former trial of the cause, may be proved by the persons who heard it, although he may have also emitted a written deposition (*r*), and although his evidence may have been taken down by a short-hand writer (*s*); while, on the other hand, the deposition of a deceased witness taken on commission is not excluded in consequence of his deposition in Court on a former trial being extant in the judges' notes (*t*). Thus also in a prosecution in England, in which the depositions do not require to be taken in writing, parole of what the witnesses said is received, without producing a note which the magistrate or clerk of Court had made of it at the time (*u*). On this ground also, where a witness depones that he observed certain facts, and wrote a full account of them in a letter to any one, his oath is the proper evidence of them; and the letter does not require to be produced, unless the party wishes to prove its terms (*x*). So where a witness swore that he had a conversation with a person since deceased, who referred to a book to refresh his memory on a fact otherwise known to him, the witness was allowed to repeat that person's statement as to the fact, without producing the document (*y*); and it is never necessary to put in evidence the memorandum which a witness merely uses for the purpose of refreshing his memory (*z*).[8]

§ 118. In some cases parole proof of the proceedings of meetings was excluded, on the ground that they could only be proved

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(*o*) Aitchison *v.* Patrick, 1836, 15 S., 360. (*p*) Dean's case, 1729, 2 Hume, 355. (*r*) Mackenzie, 1827, Syme, 158—Tod *v.* Winchelsea, 1828, 8 C. and P., 387. (*s*) Taylor, 354. The same rule applies when the oath is proved in a charge of perjury; Monaghan, 1844, 2 Broun, 181. (*t*) Willox *v.* Farrell, 1848, 10 D., 807. (*u*) R. *v.* Tarrant, 1833, 6 Car. and Pa., 182—R. *v.* Pressly, 1833, ib., 183—Robertson *v.* Vaughton, 1838, 8 Car. and Pa., 252—Jeans *v.* Wheedon, 1843, 2 Mo. and Rob., 486. (*x*) Forteith *v.* E. Fife, 1820, 2 Mur., 468.

(*y*) Oliver, 1827, Syme, 224. (*z*) Dalison *v.* Stark, 1808, 4 Esp., 163—R. *v.* Tarrant, 1833, 6 Car. and Pa., 182—R. *v.* Pressly, 1833, ib., 183—Maugham *v.* Hubbard, 1828, 8 B. and C., 14.[8]

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[8] Nor can such a document be recovered by a diligence; Livingstone *v.* Dunwoodie, 1860, 22 D., 1333.

by the minute prepared on the occasion (*a*). But the proper mode of proving such matters is by the oaths of persons who were present, who may use the minute to refresh their memories, if they were engaged in its preparation (*b*).[9] This rule applies to proceedings of directors of joint-stock companies; the Act which allows these to be proved by the signed minutes having been designed for extending and not for limiting the mode of proof (*c*). It would seem, however, that when the minutes of proceedings form part of the records of a court of law, as minutes of meetings of creditors under the Sequestration Acts, they are the only admissible proof of the *res gestae* (*d*).

§ 119. We have already seen that when a question arises between a society and a third party as to the terms of a contract, and where his adoption of the contract as noted in the society's minute-book is to be inferred from the circumstances, parole of the terms of the transaction is excluded (*e*). In such a case the question is not as to the truth of the minutes, but as to the terms of the contract which they set forth.

§ 120. As contrasted with the case last noticed, it has been

(*a*) So ruled as to the proceedings of a senatus academicus; Hamilton *v.* Hope, 1827, 4 Mur., 289—and of road trustees; M'Ghie *v.* M'Kirdy, 1850, 12 D., 442. The *quasi* public character of such bodies seems to account for these decisions, which are, with deference, thought to be erroneous. See also Ivison *v.* Edinburgh Silk Co., 1846, 9 D., 1039—and § 111, (*m*). (*b*) Kers *v.* Penman, 1830, 5 Mur., 145—Arneil *v.* Robertson, 1843, 5 D., 400—Mathers *v.* Lawrie, 1849, 12 D., 433—Wilson *v.* Glasgow & S. Western Co., 1851, 14 D., 1—Northern Rail. Co. *v.* Inglis, 1851, 13 D., 1315.

(*c*) Northern Ry. *v.* Inglis, *supra*. This decision was pronounced on the provisions of the English Act of 8 Vict., c. 16, §§ 98, 99, which are similar to those of the Scotch Act 8 Vict., c. 17, § 101.[10] (*d*) Smith *v.* Kemp, 1828, 4 Mur., 404. See also § 111 (*m*). (*e*) Whitford *v.* Tutin, 1834, 10 Bing., 395, *supra* § 113. Compare with this case Hill *v.* Lindsay, 1847, 10 D., 78.

[9] In a case regarding the proceedings of a provisional committee of a projected railway, the Lord Justice-Clerk (Inglis) observed, "Minutes of meetings by parties who meet to deliberate about some project in which they have a common interest, are not evidence at all. This was settled in the case of Macartney *v.* Mackenzie, which has ever since been followed as an authoritative judgment. But they may be taken as adminicles of evidence, and may, along with other evidence, be brought forward to prove the proceedings at the meetings. I am not speaking of meetings of corporate bodies, or of any thing of that kind, but of meetings of parties met to deliberate about some project which they have in common. A person may be put into the box to depone to the accuracy of a minute of such a meeting; but the minute itself is no evidence at all, and does not even prove the presence at the meeting of anybody who does not subscribe it. But by making a party to the minute a witness, it may be established who were present at the meeting"; Johnston *v.* Scott, 1860, 22 D., 398, 402—Macartney *v.* Mackenzie, 1831, 5 W. and S., 504.

[10] 19 and 20 Vict., c. 47, § 40.

held in England that parole of the terms of resolutions which have been ostensibly read at a public meeting is admissible in proving its proceedings; because the question is not what does the paper contain, but what was the resolution proposed verbally to the meeting; and because the speaker may have materially deviated from the terms of the paper in his hand (*f*). On the same principle, in a trial for administering an unlawful oath, the terms of it were allowed to be proved by a witness, who stated that he believed the accused read the words from a paper, which was not produced (*g*).

§ 121. The rule thus illustrated only excludes parole evidence of matters set forth in the document, and therefore collateral facts relating to the same transaction may be proved by witnesses, if in their own nature they admit of that kind of proof. For example, where a written contract of copartnery only authorised certain branches of trade, parole was admitted to prove that the partners had homologated transactions by the directors in another branch (*h*). So in an English case, where there had been a written contract for repairing the inside of a house, and improvements had been made on the outside, the contractor suing for the latter as under verbal orders, was not required to produce the written agreement (*i*). Thus also where a tenant had possessed for several years under a missive, which did not mention the duration of the lease, but raised the inference that it was for more than one year, the Court of Session allowed that part of the contract to be proved by witnesses (*k*). And parole proof of the duration was admitted in England, where the tenant held under written rules, which were silent on the point (*l*).[11]

On the same principle, a tenant may prove by parole the fact of his occupation, where that is relevant to the case, because the terms of his written lease are not involved (*m*). And one who sues

(*f*) R. *v.* Sheridan and Kirwan, 1811, 31 How St. Tr., 673—R. *v.* O'Connell, 1843, separately reported by Armstrong and Trevor, 235, 237. (*g*) R. *v.* Moors, 1805, 6 East., 421, note. (*h*) Maxton *v.* Brown, 1839, 1 D., 867. (*i*) Reid *v.* Batte, 1829, Moo. and Mal., 413. Compare with this case those noted above, § 113, (*y*).

(*k*) M'Leod *v.* Urquhart, 1808, Hume, D., 840. See also M'Rorie *v.* M'Whirter, 18th December 1810, F.C.; and Pollock *v.* M'Andrew, 1828, 7 S., 1891; *infra*, § 166—See also Duke of Athole *v.* Spankie, noted in Hume D., 786. (*l*) Hay *v.* Moorhouse, 1839, 6 Bing. New C., 52. (*m*) R. *v.* Holy Trinity, 1821, 7 B. and C., 611—Doe *v.* Harvey, 1832, 8 Bing, 239, *per curiam*—Hamilton *v.* Hamilton, 1825, 4 Mur., 8—See Hutchison *v.* Ferrier, 1851, 13 D., 837; 1 Macq., 196.

[11] The date of an undated bill or note may be proved by parole. But a bill or note issued without a date will not authorise summary diligence; 19 and 20 Vict., c. 60, § 19.

certain persons as members of a copartnery may show by parole that they acted as such, and he is not bound to put in evidence the written contract of copartnery; because its provisions are collateral to his ground of action (*n*). On this principle also, where *prima facie* evidence of ownership of a vessel is sufficient, as in an action of damages for wrongous arrestment, it is not necessary to produce the registry (*o*).[12]

§ 122. From these rules it follows that a party who objects to parole, on the ground of its involving the terms of a writing, must shew that the document embraces the facts which the witness is tendered to prove; and the parole proof will not be rejected merely

(*n*) Alderson *v.* Clay, 1816, 1 Starkie R., 405. (*o*) Snadon *v.* Stewart, 1819, 2 Mur., 67. See also Johnstone, 1829, 2 Al., 507; *infra*, § 132.

[12] The following recent decisions will farther illustrate the principle treated of in the text:—

A tenant under a written lease, by which he had undertaken to keep the fences in his farm in good tenantable condition, pleaded in defence that when he signed his lease his landlord had promised to fence the farm, and that he had not fulfilled the promise. Held that it was incompetent to prove the defence, because it was an attempt by parole evidence to engraft a condition on a written lease; Macgregor *v.* Strathallan, 1862, 24 D., 1006.

A was the drawer and B the acceptor of a bill for accommodation of C. D, as agent for all the parties, drew out a minute of agreement, which was duly executed; the agreement set forth that A was to retire the bill to the extent of one-fourth of the sum in it, and B to the extent of three-fourths; and that it was agreed that C was to give A an heritable security for the one-fourth, and B an heritable security for the three-fourths; and that C had accordingly executed these bonds. D, the agent, advanced the money in the bill, and it was indorsed and handed to him. B afterwards, without A's knowledge, assigned to D the heritable security granted to him by C. B and C both became bankrupt, and D, the agent, charged A on the bill. A suspended, and averred that he had instructed D, as his agent, to procure from C a full security for all his (A's) liabilities under the bill, and that D had failed to fulfil these instructions, inasmuch as he had procured a security to the extent of one-fourth of the bill only; and he farther pleaded, that, in taking from B the assignation to his security, D had violated the spirit of his instructions and the understanding of the parties. D pleaded that his charge could be resisted only by proof of no value by his writ or oath; and that the final agreement of parties was to be found in the agreement only, in which it was stated that the security to be given by C to A was to cover only the one-fourth of the amount in the bill. But the Court held, that as A's plea resolved, not into a defence of no value, but a defence grounded on D's neglect or unskilful performance of professional duty, it might be proved *prout de jure;* and that his averment as to the instructions given to his agent D was an averment of a contract totally distinct from that embodied in the minute, and that proof of it was therefore not excluded; M'Alister *v.* Gemmel, 1862, 24 D., 956. This judgment has been affirmed on appeal, March 1863.

In an English case, evidence to show, contrary to the terms of a deed, that it was agreed that the consideration was not to be paid in money but satisfied by delivery of goods, was rejected; but evidence was admitted to show that in point of fact goods were accepted in satisfaction of the consideration; Smith *v.* Battems, 1857, 26 L. J., Exch., 282.

on suspicion of that being the case (*p*). Accordingly in an English case the Court refused to stop the examination of a witness, who stated that a written agreement relating to the matter in dispute had been produced in a former trial between the same plaintiff and defendant; but that he did not know its contents, or who were the parties to it (*r*). On the other hand, if a witness is asked whether a certain statement was made, the counsel on the other side may require that he be first asked whether it was made in writing, and if the witness answers that it was, the examination will not be allowed to proceed (*s*).[13]

§ 123. The rule thus considered not only excludes parole of the terms of a writing as a whole, and a detailed statement of its contents, but also every question which involves a narrative of any matter which the document records. Thus it has been held incompetent to ask a witness what is the import of a correspondence (*t*), or the nature of an action (*u*), who is the granter of a written lease (*x*), or the acceptor of a bill (*y*), or whether decree was obtained in a certain action (*z*), or what is the extent of jurisdiction under the titles of a burgh (*a*), whether certain names are in

(*p*) This principle is illustrated by the case of Thom *v.* N. British Bank, 1850, 13 D., 134, *supra*, § 77. (*r*) Wood *v.* Morris, 1810, 12 East., 237. (*s*) The Queen's case, 1820, 2 Brod. and Bing., 292. (*t*) Gibson *v.* Anderson, 1846, 9 D., 1. (*u*) Stewart *v.* Buchanan, 1816, 1 Mur., 38. (*x*) Innes *v.* Lord Peterborough's Exec., 1828, 4 Mur., 433. (*y*) M'Nab *v.* Telfer, 1821, 2 Mur., 481. But parole seems admissible to prove who retired a bill; S. C.

(*z*) Dicksons *v.* Ponton, 1824, 3 Mur., 440. (*a*) Johnstones *v.* Mag. of Kilrenny, 1828, 6 S., 620.

[13] At the trial of an action for relief of a call on bank shares, on the ground of a sale of the shares, by intervention of stock-brokers, by the pursuer to the defender, the question occurred whether a sufficient transfer of the shares had been offered to the defender. The pursuer's stock-broker deponed, "There are printed rules as to transfers, and these guide our practice;" and in respect of the existence of these printed rules, the defender objected to the question, Whether the transfer tendered was "in ordinary terms and according to your practice, and was it tendered according to your practice?" But the Court, affirming the ruling of Lord Ardmillan, the presiding judge, held that the question was competent, because, although it was proved that these were rules, it had not been proved that these rules regulated either the terms of transfers or the mode of tendering them. The Lord President (M'Neill) was not prepared to say whether, even if there had been such proof, parole evidence of practice would have been excluded; Rait *v.* Primrose, 1859, 21 D., 965. But where, in a question as to a partnership between the pursuer and her brother, it was proved that there had been a written contract of copartnery, not probative, but validated by *rei interventus;* the question, "What was your share in the copartnery?" was held incompetent, though there had been no express proof that the interests of the partners was provided for in the contract; Clark *v.* Clark's Trustees, 1860, 23 D., 74.

the commission of the peace (*b*), or whether a certain vessel is entered in the registry (*c*). So parole is admissible to prove when a certain apprenticeship was entered on, but not the date of the written indenture (*d*). A witness may be asked whether a letter was written and sent by one person to another, and whether the witness made a copy of it, but not what the letter or copy contained (*e*); and it is competent to inquire whether the witness was asked to become cautioner for a party, and agreed to do so, but not whether he took from the principal debtor a written obligation in certain terms (*f*). A witness may be asked if a certain action was brought, but not by whom it was brought, when that is material to the issue (*g*); and it is competent to examine him as to whether certain operations were discontinued, but not to ask whether they were interrupted by an interdict (*h*). Nor may a witness even be asked what he stated in certain letters written by himself, which might have been produced (*i*).

§ 124. A document, however, has frequently to be mentioned to a witness with the view of asking him a competent question regarding it, as in some of the cases noticed in the preceding section. When this is done, the document should be described generally, so as to identify it to the witness; but the particular point of it which is involved in the issue should, if possible, be avoided. The Court will not allow the question to be put in a form which involves a statement of the contents of the document; as where a witness is asked whether he wrote a letter in certain specified terms, or whether he carried a letter agreeing to refer certain matters to arbitration (*j*).

§ 125. In general the exclusion of parole where there is written evidence applies to examinations in cross as well as in chief (*k*). But when the cross-examination only follows up the examination in chief, questions, otherwise inadmissible, will be allowed, if they are necessary in order to prevent the jury drawing a wrong inference as to a document to which the witness has referred. Thus one who deponed that he received a certain decree was allowed to be

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(*b*) Cooper *v.* Mackintosh, 1823, 3 Mur., 359. (*c*) Snadon *v.* Stewart, 1819, 2 Mur., 63. (*d*) Spence *v.* Howden, 1819, ib., 169. (*e*) Miller *v.* Moffat, 1820, 2 Mur., 318—Whyte *v.* Clark, 1817, 1 Mur., 241. (*f*) Clark *v.* Thomson, 1816, 1 Mur., 166. (*g*) Smith *v.* Puller, 1820, 2 Mur., 345. (*h*) Welsh *v.* Stewart, 1818, 1 Mur., 404. (*i*) Aitchison *v.* Robertson, 1846, 9 D., 15.

(*j*) Peter *v.* Terrol, 1818, 2 Mur., 30. (*k*) Greig *v.* Edmonstone, 1826, 4 Mur., 70—Rose *v.* Gollan, 1816, 1 Mur., 84. But see M'Cracken *v.* Pearson, 1821, 2 Mur., 553.

asked its date (*l*), and a witness who said he had discovered certain heritable bonds over an estate, was allowed to be asked whose subscriptions they bore (*m*). On the same principle, where a party objected to a witness being asked on re-examination if he had lodged in Court a minute agreeing to make a certain payment in consequence of consent of the parties, the question was admitted with a view to explaining an answer given on cross-examination (*n*).

§ 126. When parole is inadmissible on account of there being written evidence of the facts, a note taken by a witness who heard the document read is incompetent (*o*).

§ 127. It is generally *pars judicis* in the Court, or in the commissioner taking the proof, to prevent parole evidence of the contents of documents from being received (*p*). But while this ought to be observed when the matter is important to the issue, or involves a detailed statement of the terms of a document, it ought not to be rigorously enforced when the fact is incidental and easily remembered.

§ 128. There are a few exceptions to the rule which has thus been considered:—

Witnesses are admissible to prove a custom either of a number of persons or of an individual, although each instance stands upon writing, and could not be proved as a specific fact except by writing. For example, the general practice over an estate, to require the tenants to reside on their farms, was allowed to be proved by witnesses, although parole evidence of a clause of residence in an individual lease was rejected (*r*). The general price of freeholds in a county at a particular time was allowed to be proved by parole; whereas the price paid in a particular instance could not be shown without the deed of sale (*s*). And although the premium in a certain contract of insurance cannot be proved without the policy, parole of the general rate of insurance at the time was held to be competent (*t*). On the same principle, witnesses were received in an English case to prove that William Spencer was in the habit of accepting bills drawn on James Spencer and Company (*u*). And there is an old Scotch case where it was held competent to

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(*l*) Cleland *v.* Weir, 1835, 13 S., 1143. (*m*) Pearson *v.* Walker, 1835, 13 S., 1138. (*n*) Fowler *v.* Paul, 1821, 2 Mur., 440. The report does not mention the answer given on cross-examination. (*o*) Wilson *v.* Kirkwood, 1822, 3 Mur., 199.

(*p*) Morton *v.* Hunter and Co., 1830, 4 W. S., 379, 388. (*r*) Dalziel *v.* D. Queensberry's Execrs., 1825, 4 Mur., 14. (*s*) Graham *v.* Westenra, 1827, 4 Mur., 294. (*t*) Bertrams *v.* Barry, 1818, 1 Mur., 345. (*u*) Spencer *v.* Billing, 1812, 3 Camp., 310.

prove by witnesses that a certain notary was in the practice of giving sasines as Sheriff-clerk (*w*).

§ 129. It would seem that the rule which excludes parole of the contents of documents is also relaxed, where the evidence is the result of an inspection of numerous books or papers, which could not be conveniently examined in Court (*x*). But while matters of pure fact—as a mode in which books were kept and their being vitiated (*y*), the state of accounts between the parties (*z*), the solvency of a party at a certain date (*a*), and the like—may be proved in this manner, a witness will not be allowed to state the impression which he has received as to the conduct or feelings of individuals to whom the papers relate (*b*). The reason for this distinction is, that such matters do not require to be investigated by a skilled witness, but fall peculiarly within the province of the jury who should be kept from the risk of bias by the opinion which a witness may have formed (perhaps erroneously) upon the question. Nor is such evidence of impression admissible in regard to documents which the witness has destroyed; the proper course in that case being to prove the contents of the documents by secondary evidence, and leave the jury to draw their own inference from them (*c*).

§ 130. A witness may be asked whether he has been convicted of a crime which affects his credibility, although the answer involves the terms of a judicial record (*d*). The reason is, that one who has examined a witness on the footing of his evidence being credible cannot plead that it is incredible on a point so simple and so completely within the knowledge of the witness. Besides, the party who states the objection can seldom be prepared with written evidence to prove it. But, when infamy was pleaded under the former law as a ground for excluding the witness, it could not be proved without the extract conviction; otherwise an unwilling witness might have escaped from giving evidence, by pretending that he had been convicted of a disqualifying crime (*e*).

(*w*) L. Huntly *v.* L. Forbes, 1619, M., 12,449. (*x*) 2 Al., 509—1 Starkie, 502—1 Phil., 433—Taylor, 325. (*y*) Campbell *v.* Campbell, 1834, 12 S., 578.

(*z*) Roberts *v.* Doxon, 1797, Pea. C., 83. (*a*) Meyer *v.* Seften, 1817, 2 Starkie R., 274. In Rowe *v.* Brenton, 1828, 3 Man. and Ry., 212, a witness was allowed to be asked the result of his examination of certain old records, in order to prove that they corresponded in substance with one which had been read. (*b*) Topham *v.* M'Gregor, 1844, 1 Car. and Kir., 320. (*c*) Topham *v.* M'Gregor, *supra*.

(*d*) Henderson, 1838, Bell's Notes, 256—Thomson, 1842, ib.—Johnstone, 1845, 2 Broun, 401—Cases in Bell's Notes, 255. (*e*) 2 Hume, 355—2 Al., 443—Tait, 346. See *contra*, Scott *v.* M'Gavin, 1821, 2 Mur., 490—Smith, 1829, 1 De. and And., 183.

In England, the relaxation of the strict rule in examinations *in initialibus* (on the *voire dire*) has been more general: so that if the witness discloses any document affecting his competency, he may be examined and cross-examined as to its contents (*f*), unless the writing is in Court; in which case it must be produced in order to prove its terms (*g*). Questions of this nature arose chiefly upon the objection of interest, before recent statutes had abolished that ground of exclusion.

§ 131. The patent nature of the fact that a person holds a public office, and the strong presumption arising from the undisturbed exercise of his functions, render it unnecessary to prove the fact by his written appointment (*h*). Where, however, his right is put directly in issue, the written title requires to be produced.[14]

§ 132. A witness may be examined upon a *factum proprium* of a simple nature and arising incidentally in the cause, although there may be written evidence of it, for there is little or no risk of his being mistaken upon such a matter (*i*). Thus a witness may be asked how long he was at home on furlough, without the party producing the regimental books (*j*); and whether he agreed to accept, and received a certain sum per pound as composition for his debt (*k*); and whether an action was raised by him or against him for a certain claim (*l*). So in a prosecution for theft, where the proprietor of the stolen goods has right to them under a written title, his oath is competent evidence of ownership, both on the ground thus noticed and because it is enough for the prosecutor to prove that the goods were in the lawful possession of the person from whom they were stolen (*m*). In all such cases, however, the

(*f*) Taylor, 826—1 Phil., 154. (*g*) Taylor, ib.—Phil., ib. (*h*) 2 Al., 507—Banbury *v.* Matthews, 1844, 1 Car. and Kir., 380—1 Phil., 432—Taylor, 112, 824. But see § 111, (*n*). (*i*) See *supra*, § 130. (*j*) Millar *v.* Fraser, 1826, 4 Mur., 119. (*k*) Combe *v.* Hossack, 1826, 4 Mur., 52. (*l*) Dicksons *v.* Ponton, 1824, 3 Mur., 440 Smith *v.* Puller, 1820, 2 Mur., 345. (*m*) Johnstone, 1829, noted in 2 Al., 507.

[14] In a proceeding for recovery of Crown-rents, which depended for its validity on a certificate which required, under statute, to be granted by an officer of the revenue, it was held proved that the party who signed the certificate was an officer of the revenue, although his appointment was not produced, and although he was not examined as a witness. In a question of fact whether a person who performs an act, was entitled to perform it as a public officer, it is sufficient to show that he was *de facto* in the exercise of the office; Borthwick *v.* Lord Advocate, 1862, 1 Macpherson Rep., 94, *per* L. J.-C. Inglis—Lord Adv. *v.* M'Leod, 1858, 3 Irv., 79—Lord Adv. *v.* Smith and Milne, 1859, 3 Irv., 507, *ante*, § 16, note 24.

strict rule should only be relaxed where the fact arises incidentally, or in a subordinate branch of the cause. Where it is the question directly in issue, the appropriate written evidence of it will be required (*n*).

§ 133. It has been held in England that in trials for conspiracy, rioting, and the like, the inscriptions and devices on the banners displayed by the conspirators may be proved by parole (*o*). The reason is, that these inscriptions are the public expression of the objects of the assembly; they have rather the character of speeches than writings, and are short and easily remembered; whereas, if the banners themselves had to be produced, it would often be necessary to trace them through a number of different hands; and that investigation (which would involve parole of their contents by way of identification) would, in general, be impossible from the nature of the case. On the same principle, in the trial of Daniel O'Connell, the prosecutor was allowed to prove by parole the terms of printed placards, which had been posted up in the locality of an assemblage on the day on which it took place, and the mottoes on an arch thrown over one of the streets; and the objection that it had not been shewn by whom the placards on the arch had been put up was repelled. But the evidence would not have been received unless there had been proof that there was an assemblage of people on the occasion (*p*).

The rules as to admitting parole of lost documents are considered afterwards (*r*).

CHAPTER IV.—OF THE ADMISSIBILITY OF COPIES AND EXCERPTS.

§ 134. Another application of the rule which requires the best evidence is, that when a document is in existence and accessible, it must be produced, and a copy or excerpt from it will not be admitted (*s*). The ground for this strictness obviously is, that copies are often inaccurate from inadvertence, that admitting them would afford opportunities for misleading the jury, and that a party is most

(*n*) 2 Al., 507. (*o*) R. *v.* Hunt, 1820, 3 B. and Ald., 566—Sheridan and Kirwan's case, 1811, 31 How St. Tr., 678—Redford *v.* Birley, 1822, 3 Starkie R., 96—3 Starkie Ev., 1174—Taylor, 297. (*p*) R. *v.* O'Connell, 1843, separate report, 235-237. But see R. *v.* Coppul, 2 East., 25. (*r*) *Infra*, § 143, *et seq.*

(*s*) Burnett, 598—2 Al., 505—Taylor, 280.

likely to tender such secondary evidence in order to gain an improper advantage from a discrepancy between it and the original document. Excerpts are subject to the additional objection that, being selected *ex parte*, they are likely to create a different impression from that which the whole document would produce. For these cogent reasons the rule has been applied strictly, so as to exclude not only copies made incidentally, but also those which are authenticated by notaries (*t*), or sworn to be correct (*u*); and even copies taken before a Commissioner of Court are rejected (*x*), except in the special cases noticed afterwards. A party will not render the copy admissible by tendering the principal in order that they may be collated (*y*); because the principal should have been lodged in time for inspection, as well as for comparison with the copy (*z*).[1]

§ 135. In regard to admissibility, all signed duplicates are principals (*a*). So the statutory duplicate of the minute-book in a sequestration is admissible to prove the proceedings (*b*), but neither of the duplicates is evidence of documents engrossed in them (*c*). So where the possession in issue has followed upon a copy, as where a tenant has possessed on a copy of his lease, the copy of it is admissible, being his title of possession (*d*). But where the question was, whether certain deeds bearing the signature of the late Earl of Fife (who was blind) were genuine, a chartulary which had been prepared and kept by the granter's man of

(*t*) Stair, 4, 2, 8—Tait, 214. (*u*) Clark *v.* Thomson, 1816, 1 Mur., 163—Paris *v.* Smith, 1823, 3 Mur., 336—South Metropolitan Gas Co. *v.* M. Lothian, 1838, Macf. R., 13—Kay *v.* Bodger, 1832, 10 S., 831—Summers *v.* Fairservice, 1842, 4 D., 347. In Stevenson *v.* Macpherson, 1827, 4 Mur., 275, a copy admitted on record to be a true copy was rejected. This decision would probably not be repeated. In Clark *v.* Thomson, *supra*, the admissions in the pleadings were not allowed to be read as proving the contents of a bond. But an opposite decision was pronounced in Pearson *v.* Walker, 1835, 13 S., 1138. (*x*) Henderson *v.* Robb and Others, 1838, Macf. R., 171; per Lord President in Thom *v.* N. British Bank, 1850, 13 D., 134. See *infra*, § 140.

(*y*) Henderson *v.* Robb, *supra*—Carricks *v.* Saunders, 1850, 12 D., 922.

(*z*) In civil jury trials all documents must be lodged eight days before the trial; Act of Sederunt, 16th Feb. 1841, § 19.[1] (*a*) R. *v.* Castleton, 1795, 6 Durf. and East., 236—Alivon *v.* Furnival, 1834, 1 Cromp. Mee. and Roscoe, 292—See this strikingly illustrated in the E. Strathmore *v.* E. Strathmore's Tr., 1837, 15 S., 449; affirmed 1 Rob. Ap., 189. (*b*) Hunter *v.* Carson, 1822, 3 Mur., 232—Stephenson *v.* Macpherson, 1827, 4 Mur., 275. (*c*) Smith *v.* Mackay, 1835, 13 S., 323.

(*d*) Williamson *v.* Fraser, 1834, 12 S., 466—Carruthers *v.* Thomson, 1836, 14 S., 464. See Whitford *v.* Tutin, 1834, 10 Bing., 395.

[1] Production of extracts of recorded deeds, eight days before the trial, is sufficient compliance with the Act of Sederunt; Maclean *v.* Maclean's Trustees, 1861, 23 D., 1262.

business was held inadmissible to prove that his Lordship had granted a certain deed there recorded, and had signed it with his own hand (*e*). When deeds are executed in counter-part, each party signing the copy delivered to the other, each copy is in England held to be primary evidence against the subscriber (*f*), but only secondary evidence of the terms of the counter-part (*g*). In an old Scotch case where both counter-parts bore a certain marginal addition, which in the copy held by A was signed by him, and bore a faint trace of another signature, and which in the copy held by B was signed by A but not by B himself, the Court sustained it against B, on the ground that his holding the copy with the addition uncancelled shewed in the circumstances that it formed part of the contract (*h*).[2]

§ 136. It is held in England that the bought and sold notes which a broker delivers to the contracting parties are primary evidence, and must be produced or accounted for before recourse can be had to the broker's book, from which the notes were made up (*i*). When one party wishes to enforce the contract, it is enough for him to put in evidence the note which he holds; whereupon the other party must prove any discrepancy which he may allege to exist between it and the other note (*k*). It is still an open question, whether in the event of disagreement between the notes the broker's book can be resorted to (*l*). It may be used where notes were not exchanged (*m*).

(*e*) E. Fife *v.* E. Fife's Tr., 1816, 1 Mur., 107. (*f*) Roe *v.* Davis, 1806, 7 East., 363—Paul *v.* Meek, 1828, 2 Y. and Jer., 116—Burleigh *v.* Stibbs, 1793, 5 Durf. and E., 465—Taylor, 302. (*g*) Doe *v.* Ross, 1840, 7 Mee. and Wel., 102—Hall *v.* Ball, 1841, 3 Scott New Ser., 577—Munn *v.* Godbold, 1825, 3 Bing., 292, 11 B. Moore, 49, S. C. Being secondary evidence, it will be admitted although unstamped; Munn *v.* Godbold, *supra*—Paul *v.* Meek, *supra*. As to stamps for counter-parts of leases, see 16 and 17 Vict., c. 59, § 12. (*h*) Smith *v.* D. Gordon, 1701, M., 16,987.

(*i*) Goom *v.* Aflalo, 1826, 6 B. and C., 117—Thornton *v.* Meux, 1827, Moo. and Mal., 43—Hawes *v.* Forster, 1834, 1 Mo. and Rob., 368—Taylor, 299. (*k*) Hawes *v.* Forster, *supra*. (*l*) See Townend *v.* Drakeford, 1843, 1 Car. and Kir., 20—Gregson *v.* Ruck, 1843, 4 Ad. and El., New Ca., 737, 747—Thornton *v.* Charles, 1842, 9 Me. and Wel., 802; *contra* Baron Parke's opinion in the case last noted. See Taylor, 300. (*m*) Townend *v.* Drakeford, *supra*—Pitts *v.* Beckell, 1845, 13 Me. and Wel., 746, per Baron Parke.

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[2] See Grant *v.* Sinclair, 1861, 23 D., 796, in which, when two copies of a lease were made, neither of them duly attested, and the one was kept by the landlord and the other by the tenant, the landlord's copy bore that there was to be a break at the end of seven years, and the Court indicated an opinion that that meant a break optional to either party; but the tenant's copy, which in some other respects differed from that of

§ 137. When a register is made up from a day-book or scroll, the fair copy is in England held to constitute the register (*n*). But in this country the Court will probably require both to be produced (*o*), unless the original scroll has been lost.

§ 138. All copies printed from the same composition of types are primary evidence of each other (*p*). But an impression taken in a copying press from a written document has been rejected in England (*r*).[3] Lithographic copies cannot (except of consent) be handed to the jury in questions of identification of handwriting; for, however skilfully they may have been prepared, they almost always bear marks of constraint, showing that they were drawn slowly and in fragments of letters at a time, instead of being written continuously, like ordinary handwriting (*s*).

§ 139. A party is sometimes barred by personal exception from objecting to a copy being received against him, as where it had been made by himself from his own letter-book, neither the original letter nor the letter-book being in the hands of the other party (*t*). So the copy of an interlocutor engrossed in a bill of advocation was allowed to be used against the advocator, as it had been prepared deliberately, and founded on judicially by him (*u*). And on the same principle where the terms of an indenture were in issue, letters of horning by the one party, and letters of suspension by the other, in both of which the deed was narrated, were received in proof of its terms; but the presiding judge observed that the original should have been produced (*x*). And whether the copy has been prepared by a party or not, yet if he has founded

(*n*) May *v.* May, 1787, 2 Strange, 1073—Lee *v.* Meecock, 1805, 5 Esp., 177—1 Starkie, 243. (*o*) See Sturrock *v.* Greig, 1849, 12 D., 166—Mathers *v.* Lawrie, ib., 433. (*p*) R. *v.* Watson, 1817, 32 How St. Tr., 82, 86; 2 Starkie R., 129, S. C. —Hardy's Case, 1821, 1 Green's Trea. Tr., 228. (*r*) Nodin *v.* Murray, 1812, 3 Camp., 228, per Lord Ellenborough. (*s*) Kingan *v.* Watson, 1828, 4 Mur., 494—E. Fife *v.* E. Fife's Tr., 1816, 1 Mur., 108—They seem to be admissible of consent; Humphrey's case, 1839, reported by Swint., 117. See *contra*, E. Fife *v.* Fife's Tr., *supra*.

(*t*) Gall *v.* Watt, 1827, 4 Mur., 319. (*u*) Cadzow *v.* Wilson, 1830, 5 Mur., 102.

(*x*) Peter *v.* Terrol, 1818, 2 Mur., 30.

the landlord, bore on the margin that the break was to be *optional to the tenant*. The Court, on considering a proof, and concluding on the proof that the addition was made with the sanction of the landlord's factor, gave effect to the tenant's copy.

[3] In a trial for murder the Court (Lord Justice-Clerk Hope dissenting) admitted a copy taken by a copying-press of a letter from the deceased to the accused; holding that, although the original was not found in possession of the accused, the fact that it was copied in a copying-press raised a presumption that it was sent; Lord Advocate *v.* Madeline Smith, 1857, 2 Irv., 696.

on it in the cause, he will not be allowed to object to the other party doing so likewise.

§ 140. When insisting on the production of the original documents would occasion loss of evidence, the rule above illustrated is relaxed, and copies or excerpts taken at the sight of a Commissioner of Court at a diet duly intimated to the parties are admitted. This procedure is necessary where documents are in the hands of persons residing beyond the jurisdiction of the Court, who refuse to deliver them up (*y*). The same practice is followed where great inconvenience would arise to the persons to whom the original documents belong, if they were obliged to surrender them for production before and at the trial. Thus the Court admit excerpts from cess books, the originals being required for carrying on the business of the office (*z*), and excerpts from the books of a public company, which are in daily use in the company's business (*a*). And there is ground both in principle and practice for extending the rule to books of private mercantile companies and individuals; whose business ought not to be impeded by depriving them of their books (*b*). This procedure is also competent where books or documents contain entries of a private character which do not affect the case, and which the haver is entitled to keep from the public eye. The party who leads the proof has no interest or concern with these entries, and the only way in which he can get them separated from the others is by means of excerpts taken before a Commissioner. This is especially the case when the issue concerns only the party's own dealings with the company or merchant (*c*). The rule was also applied to a draft minute which was bound up with other drafts prepared in the office of the haver (a law agent) in connection with the business of his other clients (*d*).

But copies and excerpts taken on commission are only admitted on grounds such as those above set forth; the general rule excluding them where the originals can be produced without unnecessary inconvenience (*e*).

§ 141. It is not the oath of the haver in the Commissioner's

(*y*) Richardson . Forbes, 1850, 22 Sc. Jur., 481—Alivon *v.* Furnival, 1834, 1 Cromp. Mee. and Ros., 279, 291. See § 146. (*z*) Mackintosh *v.* Grant, 1829, 8 S., 184.

(*a*) Donaldson *v.* Manchester Ins. Co., 1838, 11 S., 570—Thom *v.* N. British Bank, 1850, 13 D., 134—Great Northern Ry. Co. *v.* Inglis, 1850, 12 D., 1194.

(*b*) Per Lord Fullerton in Thom *v.* N. British Bank, *supra*—Reid *v.* Hutchison, 1836, 14 S., 720—Nelson *v.* Mackenzie, 1839, Macf. R., 251. (*c*) See per Lord Fullerton in Thom *v.* N. British Bank, *supra*. (*d*) Wilson *v.* Glasgow and S. Western Ry. Co., 1851, 14 D., 1. (*e*) *Supra*, § 134.

report that authenticates an excerpt. The Commissioner should certify of his own knowledge that it was properly taken (*f*). The parties however seldom insist upon collation in presence of the Commissioner; the usual practice being for the haver to produce the original and copy in presence of that officer and the agent for the parties, whereupon his statement on oath that it is correct is entered in the report. Excerpts so taken are admissible on the trial (*g*).

But excerpts which had merely been sworn to before the Commissioner, without the originals having been produced, at a diet at which the other party's agent was not present, were held to be inadmissible at the trial (*h*).

§ 142. In cases which do not go to a jury, the practice has been to admit the excerpts, when regularly taken, without further proof of their accuracy. But in jury trials it would seem that they must be proved by a witness swearing to that fact (*i*). And in one case where excerpts from a person's books were tendered, and he was in Court at the time, the presiding judge refused to admit them, without his being examined in explanation (*k*). The originals, however, do not require to be produced; although it is proper to have them in Court at the trial, in case they should be required for collation.

Copies of documents are always admissible of consent; and it is usual in practice to receive them in order to save expense. In jury trials this ought to be done by a note of admissions signed by the party's counsel or agent (*l*).[4]

(*f*) Per Lord Justice-Clerk in Summers *v.* Fairservice, 1842, 4 D., 347. See also Thom *v.* N. British Bank, *supra.* (*g*) See Summers *v.* Fairservice, *supra*—Reid *v.* Hutchison, 1836, 14 S., 720. (*h*) Summers *v.* Fairservice, *supra.*

(*i*) Gray *v.* Sutherland, 1849, 12 D., 438—See Thom *v.* N. British Bank, *supra.* This is a useless and often inconvenient practice. (*k*) Reid *v.* Hutchison, 1836, 14 S., 720. (*l*) Act of Sederunt, 16th Feb. 1841, § 22—Macf. Pr., 200. See § 134, (*u*).

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[4] The rule, that copies are not receivable in evidence, is in general inapplicable to documents of a public or *quasi* public character ordered or authorised by Act of Parliament. Many recent Acts provide that copies of such documents shall be received in evidence, if certified by the proper officer, without proof of his signature or official position. For example, copies of rules of Friendly Societies, and documents relating to such societies, purporting to be signed by the registrar, are competent evidence without proof of the signature (18 and 19 Vict., c. 68, §§ 30, 48); copies of registers under the Burial Act are evidence of the burials entered therein (18 and 19 Vict., c. 68, § 31). Copies of the registers of British ships have the same effect as the original register (18

CHAPTER V.—SECONDARY EVIDENCE OF DOCUMENTS LOST OR WITHHELD, &c.

§ 143. Secondary evidence is admitted to prove the contents of documents which are withheld by an opponent, or which have been destroyed or lost without fault in the party founding on them (*m*). In such cases the adducer leads the best evidence in his power; and it is not to be presumed that he tenders the secondary evidence improperly, in the belief that the original would not support his case.[1]

(*m*) Macf. Pr., 197—2 Al., 509—1 Starkie, 398, 502—Taylor, 303.

and 19 Vict., c. 91, § 15); copies of special rules for a colliery, certified under the hands of one of the inspectors, are evidence that such rules have been duly established at the colliery (23 and 24 Vict., c. 151, §§ 15, 26). Thus, also, subscription of a printed memorandum or articles of association of a Joint-Stock Company is equivalent to subscription of the original deed or deeds; and copies of the reports of inspectors appointed under the Joint-Stock Companies' Acts, authenticated by the seal of the companies, are legal evidence of the opinion of the inspectors (19 and 20 Vict., c. 47, §§ 11, 52; 25 and 26 Vict., c. 89, § 61). So copies of registers under the Nuisance Removal Act, signed by the keepers of such registers, and of resolutions by the local authority under that Act, signed by the chairman, are competent evidence (19 and 20 Vict., c. 103, §§ 33, 51). So extracts of entries from a register of births, authenticated by the registrar, are evidence (17 and 18 Vict., c. 80, § 57).

It is a general rule in England that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute exists which renders its contents proveable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence," "provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted" (14 and 15 Vict., c. 99, § 14). Thus it has been that bye-laws of a railway company, made pursuant to the provisions of the Railways Clauses Act (England), and confirmed and allowed, were public documents, of which certified copies were admissible; Motteram *v.* Eastern Counties Railway Company, 1859, 7 Scott's C. B. N. S., 58. So also registers of births, marriages, and deaths, the books of Bank of England, or East India Company, &c., are in general proveable by examined copies (Best on Evidence, 3d edition, 603). In Boyle *v.* Cardinal Wiseman, 1855, 10 Exch., 654, Chief-Baron Pollock observed, "I entertain some doubt whether, when the examination of the whole question takes place, it may not be found that there is no difference between documents which are of a public nature, such as registers, records, and matters proceeding from courts of justice and other public places, and documents which, though of a private nature, are meant to be made public, such as commercial instruments, charter parties, bills of exchange, bonds, and such matters, which are the indiciae of property throughout the world;" it might possibly be right not to deal with the latter as with private letters.

[1] When the defender in a divorce declined to appear for the purpose of identification by the pursuer's witnesses, the pursuer was allowed to show the witnesses the photograph of the defender; Forbes *v.* Forbes, 1861, 24 D., 145.

The justice of this rule is most apparent where the princip has been destroyed by the opposite party. Accordingly, where on had burnt a disposition, the draft was received against him (*n*) and parole has repeatedly been admitted to prove the contents documents which an opponent had destroyed (*o*), and to suppl clauses which he had obliterated (*p*). Even in a trial for forge the prosecutor may prove the terms of the fabricated document b parole, where the prisoner has destroyed or defaced it (*r*).

§ 144. The contents of a lost document, also, may be proved b a copy (*s*), or by parole (*t*).[2] And secondary evidence is admitte more readily when the original writing was old, and had been fo lowed by possession (*u*). So the existence and descent of a pee age may be proved by cotemporaneous documents of a public an private nature, and by usage, if the original patent has been lost (*x* Thus also in ancient matters an instrument of sasine followed b possession is presumptive evidence of the warrant which it na rates (*y*); and entries of an old date in a chartulary, proved to b in the handwriting of the time are admissible (*z*); and in a que tion of the mode of electing burgesses to sit in Parliament, an o printed list of burgesses was admitted in proof of the usage 11 years before (*a*). But secondary evidence of old documents wi not be admitted if the originals are extant. For this reason printed copy of the *Rotuli Scotae* (the original of which is in exis ence) was rejected in a peerage case (*b*).

(*n*) Ross *v.* Fisher, 1833, 11 S., 467. (*o*) Kennoway *v.* Ainslie, 1752, M 12,438—Hutchison *v.* Tod, 1823, 2 S., 318—Anderson *v.* Boyd, 1827, 5 S., 927—Boyt *v.* Rintoul, 1832, 5 De. and And., 215—Lillies *v.* Lillie, 1832, 11 S., 160.

(*p*) Ronald, 1830, 8 S., 1008. (*r*) 1 Hume, 164; Chatto, 1753; Camero 1754; Hay, 1819, there cited. (*s*) Synod of Merse *v.* Scot, 1753, M., 15,823 Miller *v.* Moffat, 1820, 2 Mur., 322—Wright *v.* Ewing, 1828, 4 Mur., 586—Baugh Murray, 1834, 12 S., 279—Drummond *v.* Hunter, 1834, 12 S., 620; affirmed on meri 7 W.S., 564. (*t*) Paris *v.* Smith, 1823, 3 Mur., 335—Miller *v.* Fraser, 1826, Mur., 115—Halliday *v.* Railton, 1830, 5 Mur., 323—M. Bute *v.* Cooper, 1830, 4 W. 335—King *v.* King, 1842, 4 D., 590. (*u*) Bullen *v.* Mitchell, 1816, 4 Dou 297, 320—Lynedoch *v.* Liston, 1841, 3 D., 1078, 9—Bull, N.P., 254. (*x*) Cra furd and Lindsay Peerage Case, 1848, 2 Cl. and Finn., 534; 13 D. (H. of Lords' Ca 32. (*y*) Stair, 2, 3, 19—1594, c. 218. (*z*) Bullen *v.* Mitchell, *supra*.

(*a*) Gardner *v.* Reekie, 1828, 4 Mur., 439. (*b*) Crawford and Lindsay Ca *supra*, (*x*).

[2] When the contents of a lost document are proved by parole, its construction is f the Court, not for the jury; Berwick *v.* Horsfall, 1858, 4 Scott's C. B. N. S., 450.

Where a plan referred to in a deed was lost, the Court held extrinsic evidence co petent to prove the parcels mentioned in the deed; Andrew *v.* Andrew, 1855, En Jur., N. S., i, 885.

When the loss of a document has occurred while it was in the hands of the party founding on it, the Court will hesitate to admit secondary proof of its contents; as such cases are usually attended with suspicion. They will probably require the party to shew a special *casus amissionis* not attributable to any fault on his part (*c*).

§ 145. If a party when required to produce a document has failed to do so, his opponent may prove its contents by parole or a copy (*d*). And on the same principle in a trial for treason, where the prisoner had prevented a witness from removing a placard, the prosecutor was allowed to prove its terms by another placard which had been put up a few yards off, and which the witness swore he believed to have been printed from the same types (*e*).

§ 146. A further exception from the strict rule is recognised in England, and would probably be admitted in this country, when the production of the original document is impossible or highly inconvenient, as in the case of inscriptions on monuments, walls, and the like (*f*).[3] But a notice which had merely been fixed to the wall by a nail had to be produced (*g*). So where a document is in the hands of a person abroad (*h*), or of a third party who refuses to produce it on account of some right of retention or security, secondary evidence of its contents is admitted in England (*i*). If, however, the person is entitled to withhold the document on account of privilege of a public office, the principle that the community has an interest to keep it from publication excludes secondary proof of its terms (*k*).

§ 147. Whether a sufficient case of loss or destruction of the principal has been established, must be determined by the judge,

(*c*) See Schuurmans *v.* Stephen, 1832, 10 S., 839, *infra*, § 148. (*d*) Robertson *v.* Ferguson, 1820, 2 Mur., 304—M'Nab *v.* Telfer, 1821, 2 Mur., 481—Armstrong *v.* Vair, 1823, 3 Mur., 317—Mitchell *v.* Berwick, 1845, 7 D., 481. (*e*) Hardy's case, 1821, 1 Green's Trea. Tr., 227. (*f*) Doe *v.* Cole, 1834, 6 Car. and Pa., 359—R. *v.* Fursey, 1833, ib., 81. So in Bartholomew *v.* Stephens, 1839, 8 Car and Pa., 728, Mr Justice Patteson admitted a copy of a notice which had been on a board on the top of a pole, that all dogs found trespassing on the premises would be shot. See also 1 Starkie, 503—Taylor, 311. (*g*) Jones *v.* Tarleton, 1842, 9 Me. and Wel., 675. (*h*) Alivon *v.* Furnival, 1834, 1 Cromp., Mee. and Ros., 277—See Richardson *v.* Forbes, 1850, 22 Sc. Jur., 431. *Supra*, § 140. (*i*) Doe *v.* Clifford, 1847, 2 Car. and Kir., 448—Doe *v.* Ross, 1840, 7 Me. and Wel., 102. (*k*) Little *v.* Smith, 1846, 8 D., 265, and 9 ib., 737, S. C.—Craig *v.* Marjoribanks, 1823, 3 Mur., 347.

[3] A copy of a printed notice posted on the walls of Ibralia, of which Prince Gortschakoff was in the military occupation, prohibiting in his name the export of wheat, was admitted as proof that export of wheat was prohibited; Bruce *v.* Nicolopulo, 1855, 11 Exch. 129.

although it should involve a question of disputed fact (*l*). He ma decide upon the evidence of one witness (*m*), or upon the depos tions of persons examined as havers (*n*)[4]; and he is entitled to us his own discretion as to the competency of the proof adduced be fore him, without being tied down to strict rules of evidence; that he may even receive hearsay upon the point (*o*). It also li with the judge, and not with the jury, to determine whether a cop of a missing document is sufficiently proved to be laid before th jury (*p*).

§ 148. It must of course depend on the circumstances of eac case, whether the party has expended such an amount of care an diligence in searching for the document, as will entitle him prove its contents by secondary evidence. He does not require exhaust every possible chance of recovering it (*r*). But he mu show that he has *in bona fide* used every means which pruden would suggest as likely to attain that object (*s*). Accordingly, copy tendered on the ground of the original not having been pr served was rejected, because no proper search for it was prove and because the copy had been made after the commencement the suit, while the original had existed several months thereaft and should have been preserved (*t*).[5] And where the principal w traced into the hands of the party tendering the secondary eviden and it was not proved to have been lost without his fault, parole its terms was rejected, although there was no ground for suspecti that he had destroyed it fraudulently (*u*). Where documents a said to be withheld, it is enough for the party tendering the

(*l*) This is seen in everyday practice. The English rule is the same, Taylor, 30 Best on Ev., 346. (*m*) Miller *v.* Fraser, 1826, 4 Mur., 115—Hallilay *v.* Rail 1830, 5 Mur., 323—Scott *v.* Miller, 1830, 5 Mur., 242. (*n*) Home *v.* Hardy, 18 4 D., 1184—Ewing *v.* Crichton, 1827, 4 Mur., 184—Scott *v.* Miller, 1830, 5 Mur., 24

(*o*) See Christian *v.* Kennedy, 1818, 1 Mur., 424—Miller *v.* Moffat, 1820, 2 Mur., —R. *v.* Kennilworth, 1845, 7 Ad. and El., 642. See *supra*, § 105. (*p*) Pollock *v.* Morris, 1845, 7 D., 973. *Supra*, § 141. (*r*) Taylor, 304.

(*s*) This is well brought out in Lord Melville's trial, 1806, 29 How St. Tr., 690-7 See also cases in 1 Mur., 299, 345; 2 Mur., 304; 3 Mur., 200. (*t*) Miln Samson, 1843, 6 D., 355. (*u*) Schuurmans *v.* Stephens, 1832, 10 S., 839.

[4] Clark *v.* Clark's Trs., 1860, 23 D., 74.

The pursuer of a divorce proposed to examine herself as a haver to prove the of a document, and so make way for parole proof. The Court held that she wa incompetent witness; and, as the loss of the document was not otherwise proved, jected the parole evidence; Longworth *v.* Yelverton, 1862, 24 D., 696.

[5] Ritchie *v.* Ritchie, 1857, 19 D., 505—A *v.* B, 1858, 20 D., 407—Clark *v.* Cla Trs., 1860, 23 D., 74—Russell's Trustees *v.* Russell, 1862, 24 D., 1141.

condary proof to trace them into his opponent's hands, after which it lies on the latter to show that his possession has terminated (*v*). In England the search does not require to have been made recently, or with special reference to the cause, if it has been with sufficient care (*x*). Where there are duplicates of the principal, they must both be accounted for before the secondary evidence will be received (*y*). But this does not hold in England as to contracts executed in counterpart (*z*). In a claim by the crown for arrears due under a tack of teinds, the tack not being produced by the crown, Lord Neaves in the Exchequer Court ruled that secondary evidence of its terms is admissible, and that an action of proving its tenor is not necessary. His lordship's decision was given with reference to the law of England, to which the law of the Exchequer Court in Scotland is in some respects assimilated. This ruling may be questioned (*a*).

§ 149. It seems not to have been settled in this country whether the existence of an authentic copy will exclude parole of the contents of the original. In one case where a placard was admitted, a witness having sworn he believed it to be identical with one which had been put up a few yards off, but which he was prevented by the panel from taking down, Lord President Hope remarked that the existence of the copy excluded parole of the terms of the original (*b*). But this was only *obiter dictum*, and may be explained upon the principle that all impressions from the same setting of types are primary evidence of each other (*c*). Later practice seems not to distinguish in point of admissibility between the various degrees of secondary evidence; although the general superiority of copies in point of credibility is recognised (*d*). This is the rule in England, and seems to be well founded; because the existence, and still more the authenticity, of any copy may be unknown to the party leading the proof; the copy may be scarcely (if at all) more trustworthy than parole of the contents of the original; while the opposite principle would exclude parole when

(*v*) R. *v.* Thistlewood, 1820, 33 How St. Tr., 757, 758—R. *v.* Ings, 1820, ib., 989—Taylor, 313. (*x*) Fitz *v.* Rabbits, 1837, 2 Moo. and Rob., 60. In this case a search made three years previously was held sufficient. See also Taylor, 309.

(*y*) R. *v.* Castleton, 1795, 6 Durf. and East., 236. (*z*) Doe *v.* Ross, 1840, 7 Mee. and Wel., 102—Hall *v.* Ball, 1841, 8 Scott N. C., 577—Munn *v.* Godbold, 1825, 3 Bing., 292; 11 B. Moore, 49, S.C.—Taylor, 301, 2—*supra*, § 135.

(*a*) Adv.-Gen. *v.* Sinclair, 1855, 17 D., 290. (*b*) Hardy's case, 1821, 1 Green's Trea. Tr., 227. (*c*) See § 138. (*d*) See Scott *v.* Miller, 1830, 5 Mur., 242—Hallilay *v.* Railton, 1830, 5 Mur., 324.

there is an abstract, and an abstract when there is a full copy; ar consequently a scale of several degrees of secondary evidence woul be formed, each of which would require to be exhausted before th one lower down could be reached. Such a practice would encur ber cases both in preparation and at the trial with lengthene and often difficult collateral investigations. None of these disa vantages are counter-balanced by corresponding benefits, and ar risk of injustice from admitting the different kinds of seconda proof indiscriminately is excluded, as it is always in the power the other party to produce the copy or abstract which he conside more trustworthy than the evidence adduced against him (*e*).

§ 150. It seems not to be indispensable to the admission of copy that it should have been collated with the original (*f*). B of course its value is much enhanced by that security. There mu however be evidence, varying with the circumstances, to show th it is a true copy, and it will probably not be received without su proof, unless the original and copy are both of ancient date (*g*). copy of a copy is inadmissible in England (*h*). But the poi seems not to have been decided in this country (*i*). Before s condary evidence of a document will be received, there must proof or ground for presuming that the principal was admissibl as that it was stamped (*k*),[6] and probative (*l*), where these are r quisite; and a party will not be allowed to found upon a scroll u less he has proved that the deed was executed (*m*). But it does n seem to be necessary that the instrumentary witnesses (appearin to be so from the secondary proof adduced) should swear to a di tinct recollection of their attestations, provided they have a gener

(*e*) Hall *v.* Ball, 1841, 3 Scott's New Ca., 577—Doe *v.* Ross, 1840, 7 Mee. and W 102 Taylor, 354—1 Starkie, 619. (*f*) Bishop Atterbury's trial, 1723, 16 H St Tr., 494, 509. (*g*) See Swin. Rep. of Trial of Humphreys (*soi-disant* E. Bitling), 1889, p. 175. (*h*) Everingham *v.* Roundall, 1838, 2 Moo. and Ro 188 Taylor, p. 356. (*i*) See § 109, as to hearsay of hearsay.

(*k*) Goodier *v.* Lake, 1737, 1 Atk., 446—Crowther *v.* Solomons, 1848, 18 Law Jou New Ser. (Com. Pl.), 92—R. *v.* Culpepper, Skin., 673—Doe *v.* Whitefoot, 8 Car. a Payne, 270. It would appear that stamping will be presumed; 1 Bell Com., 322—Ta 164 Shand's Prac., 838—Crowther *v.* Solomons, *supra*. Where there is faint trace a stamp of some kind, the onus of proving it is deficient lies on the party alleging th Doe *v.* Coombs, 1842, 3 Ad. and El., 687—1 Greenl., 107. (*l*) Ersk., 4, 1, 56 Tait 211. (*m*) Drummond *v.* Thomson's Trs., 7 W. S., 564.

[6] It seems to lie on the party who objects to secondary evidence of a lost deed prove that the deed was not stamped; Closemadewe *v.* Carrel, 18 C. B., 36—Best Evidence, 3d edition, 310.

recollection of the fact; and such evidence will not be considered necessary where there is a strong proof that the original was properly attested (*n*).

The subject of the foregoing sections is treated at some length in the chapters on actions of proving the tenor, where the rules as to admitting the secondary evidence without a process of that kind will be found.

(*n*) See Lord Melville's trial, 1806, 29 How St. Tr., 784. See this noticed in the chapters on Proving of the Tenor, *infra*.

TITLE V.

OF THE ADMISSIBILITY OF PAROLE AND OTHER EXTRINSI EVIDENCE TO AFFECT WRITINGS.

§ 151. In following up the rule which requires the best ev dence we proceed to consider the principle by which it is incon petent to contradict, modify, or explain writings by parole or oth extrinsic evidence. The grounds for this principle are, that tl parties have constituted the writing as the only outward and visib expression of their meaning, and that, a document deliberate prepared as the record of a transaction being the best of all proc to admit parole or extrinsic circumstances in contradiction or e planation of it, would be to allow the legal effect of superior ev dence to be altered by that which is specifically inferior (*a*).

§ 152. These principles apply not only to formal deeds, b also to missives, letters, minutes, and all other documents, whi embody the terms of contracts between the parties, or obligatio by one of them, and which are really designed for recording a proving their final intentions (*b*).[1] The rule also applies (but wi

(*a*) Tait, 326—2 Al., 609—1 Greenl., 353—Taylor, 742—2 Phil., 350—3 Stark 752. (*b*) The principle has been applied to a letter of guarantee; Wills *v.* Ho den, 1831, 4 D. and A., 437—Tham *v.* Sheriffs, 1725, Rob. Ap., 535; and to a min by counsel settling a case on a trial; Johnstone *v.* Union Canal Co., 1834, 12 S., 3 and 1 Sh. and M'L., 117—*infra*, § 164; and to markings of partial payments of a bi Macfarlane *v.* Watt, 1828, 6 S., 556—See also 2 Al., 610—Taylor, 746—2 Ph 350.

[1] A bank pass-book is not a fitted, but only a current account, and a bank may, defence to an action by a customer for the balance as appearing in the pass-book, pr that a sum has been entered twice by mistake, although the entries are initialed by officers of the bank. This was ruled by the House of Lords, reversing the judgment the Court of Session, where it had been held that the several entries were acknowle ments by the bank of receipt of money, and could be disproved *ope exceptionis*, only

some specialties) to instruments and registers which the law has intrusted to recognised officials as the appropriate record of formal or judicial proceedings. But when an official narrative is not required by law, its existence will not exclude parole proof of the facts; nor will witnesses be inadmissible in regard to matters which, although recorded in an official instrument along with facts requiring that mode of proof, do not fall properly within its sphere (*c*).[2]

The inadmissibility of extrinsic proof to modify these writings is considered afterwards in treating of them (*d*). In the following chapters, we shall only notice the application of the rule to writings executed by the parties, or those for whom they are responsible.

CHAPTER I.—OF THE ADMISSIBILITY OF PAROLE AND EXTRINSIC EVIDENCE TO CONTRADICT OR MODIFY WRITINGS.

§ 153. The first branch of this rule is, that a written instrument may not be contradicted or modified by the evidence of witnesses. Thus parole is inadmissible to contradict the consideration in a

(*c*) Stair, 4, 42, 9—Ersk., 4, 2, 5—Bell's Pr., 2220, 1—Tait, 4—Anstruther *v.* Thomson, 1611, M., 12,499—Lawrie *v.* Gibson, 1671, M., 12,501—Malvenius *v.* Hepburn, 1686, M., 583—Stewart *v.* Mag. of Edinburgh, 1697, M., 12,536—Glass *v.* Stuarts, 1715, M., 12,507—Montgomerie *v.* Ainslie, 16th Nov. 1816, F. C. (*d*) See the chapters on judicial records, notarial instruments, and messengers' executions.

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the writ or oath of the pursuer; Rhind *v.* Commercial Bank, 1857, 19 D., 519; reversed, 1860, 3 Macqueen, 643, and 32 Jur., 283.

The docqueted balance sheets of a mercantile company (which are documents in *re mercatoria*, and do not require the statutory authentication) may be challenged on precise allegations of error, as of errors in calculation, errors of accounting, &c., but the onus is on the challenger; M'Laren *v.* Liddell's Trustees, 1860, 22 D., 373, and 1862, 24 D., 577. This rule was applied in a case where a parochial board disputed the accuracy of the accounts of their inspector, which had been marked as examined, and docqueted as correct by the finance committee, for several successive years. When mercantile accounts had been duly docqueted for a considerable series of years, and when a long period had elapsed after the date of the last docquet without challenge of the accounts, the Court held that the grounds of challenge should be limited to errors patent on the face of the balance sheets, and which could be corrected by means of the balance sheets themselves; M'Laren *v.* Liddell's Trustees, 1862, *supra*.

[2] Milne *v.* Leisler, 1862, 31 L. J. Exch., 257. See *supra*, § 110, note 1.

deed (*e*),[1] (unless there is collusion) or to prove that the obligation in it was restrictable in a certain event (*f*), or was contingent or conditional (*g*),[2] or prestable by instalments (*h*), when the contract does not bear such conditions. So the tenant under a written lease for sixty-nine years was not allowed to prove an alleged parole agreement entered into with the landlord when the lease was executed, by which rent was not to be paid for the first years' crop (*i*). And a clause in a lease bearing that buildings had been valued at the entry cannot be contradicted by parole (*k*). It is also incompetent to prove by witnesses that a bond or bill was not intended to create an obligation (*l*); or that a written contract between a landlord and outgoing tenant was not meant to disturb a previous agreement, but merely to satisfy the incoming tenant (*m*); or that a receipt bearing money to have been paid is erroneous, and that a different arrangement was made between the parties (*n*).[3] On the

(*e*) Gordon *v.* Trotter, 1833, 11 S., 696—Bruce, Pet., 1696, M., 12,329—Ellis *v.* Haig, 1693, 4 Sup., 40—Deas *v.* Fullerton, 1710, M., 921, 12,336—Browntree *v.* Jacob, 1809, 2 Taunt., 141. A party founding on his bill bearing to be for a certain value, may not prove that the true value was different; Hay *v.* Horn, 1823, 2 S., 546.

(*f*) Patterson *v.* Robertson, 1844, 6 D., 944. (*g*) Maxwell *v.* Drumlanrig, 1626, M., 12,304—Wilkies *v.* Gordon, 1618, M., 12,407—Wauchope *v.* Hamilton, 1574, M., 12,299—Rawson *v.* Walker, 1816, 1 Starkie R., 361—Ellis *v.* Haig, *supra.*

(*h*) Watson *v.* Gardner, 1834, 12 S., 588. (*i*) Gordon's Tr. *v.* Williamson, 3d Feb. 1830, 8 S., 436; 2 De. and And. S. C., 227, and session papers.

(*k*) Lawson *v.* Murray, 1825, 3 S., 536. (*l*) E. Moray *v.* Dunbar, 1630, M., 12,306—Beveridge *v.* Henderson, 1841, 4 D., 87—See the chapter on the presumed onerosity of bills and notes. (*m*) M. Tweeddale *v.* Hume, 1848, 10 D., 1053.

(*n*) Anderson *v.* Forth Marine Ins. Co., 1845, 7 D., 268.

[1] Thus it was held incompetent to prove, contrary to the terms of the deed, that it had been agreed that the consideration for the deed was to be not money but goods, but competent to prove that goods had *de facto* been accepted as the consideration; Smith *v.* Battams, 1857, 26 L. J. Exch., 232.

[2] A distinction is taken in England between an averment of an agreement or condition suspensive of a contract, and of an agreement or condition modifying the contract; in the former case parole proof is admitted, because the object is not to contradict the terms of the contract, but to suspend its operation; in the latter case the object is to limit the meaning of a deed which is admittedly a valid contract, and the evidence is inadmissible. Thus an agreement that a contract should, till a certain event, be suspended altogether, was allowed to be proved, while (at *nisi prius*) parole proof of an agreement that a contract was to have only a partial operation rejected; Pym *v.* Campbell, 1856, 6 E. and B., 370—Gudgen *v.* Besset, 6 E. and B., 986—Wallis *v.* Littell, 1861, 31 L. J., C. P., 100—Fenwick *v.* Brinkworth, 1860, 2 F. and F., 86. So also parole proof was admitted to show that an undated written contract was not intended to operate from the date of its delivery, but only from a subsequent and uncertain period: Davis *v.* Jones, 1856, 17 Scott's C. B., 625.

[3] A receipt for money is evidence of a loan, and of obligation to repay. That is not ex-

same principle where the testing clause in a probative deed had been inserted *ex intervallo* in a blank left for it (according to a common practice), it was held incompetent to prove by parole that the parties intended that the deed should not have a testing clause; as that contradicted the obligations to which they had set their signatures (*o*).[4]

§ 154. On the same grounds, where the obligants appear *ex facie* of the deed to be principals, it is incompetent, as against the creditor, to prove by parole that they are principal and cautioner (*p*), or merely agents for another party, the real contractor (*r*).[5] And when the meaning of a minute of agreement was, that the two parties should pay a certain sum equally, and one of them advanced the whole, it was held incompetent for the other to prove an alleged verbal agreement, by which he was not to be liable in relief of the half except in a certain event, which did not happen (*s*). So it is incompetent to prove by parole that a disposition *ex facie* absolute was meant to be only a security (*t*), or a trust (*u*).

§ 155. On this principle, also, where the terms of a general discharge embrace a particular debt, parole will not be received to prove that that debt was intended to be excepted (*x*); and where

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(*o*) Shaw *v.* Shaw, 1851, 13 D., 877. (*p*) Drysdale *v.* Johnstone, 1839, 1 D., 409,—see § 170, (*m*), (*n*). (*r*) Anderson *v.* Smith, 1830, 8 S., 304—Magee *v.* Atkinson, 1837, 2 Mee. and Wel., 440—Stackpole *v.* Arnold, 1814, 11 Massachussets R., 27—1 Greenl., 354—Taylor, 759. (*s*) Johnstone *v.* Union Canal Co., 1834, 12 S., 304; affirmed 1 Sh. and M'L., 116. (*t*) L. Foulis *v.* L. Lovat, 1626, M., 12,734. But see Union Ins. Co. *v.* M. Queensberry, 1842, 1 D., 1203, *infra*.

(*u*) See the chapter on proving trusts, *infra*. (*x*) Harris *v.* Churchill, 1822, 1 S., 370—Trail *v.* Christie, 1745, Elch. *Writ*, No. 20—Spence *v.* Duncan, 1706, M., 12,333.

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pressed in the document, but is the legal consequence of receipt of money. But it may be proved that the footing on which the money was received was different from loan; Thomson *v.* Geekie, 1861, 23 D., 693. Parole proof that a sum advanced, acknowledged in the following terms,—"I hereby acknowledge the receipt of £100 from A B, and agree to pay interest of the same if demanded," was a donation and not a loan, was rejected as incompetent; Robertson *v.* Robertson, 1858, 20 D., 371.

[4] A mandate to fill up the testing clause of a delivered deed is presumed; Rait *v.* Primrose, 1859, 21 D., 965.

[5] Parole evidence cannot be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into the contract; Gillott *v.* Offor, 1856, 18 Scott's C. B., 905. But parole seems admissible to shew that other parties were the true principals to the effect, not of releasing the parties to the deed, but of obliging the true principals also; 2 Smith's Leading Cases, note on Thomson *v.* Davenport, 309, 320.

a policy of insurance was on "goods from Surinam to London, in ship or ships," it was held incompetent to prove by witnesses that a particular ship had been excepted by a verbal agreement (*y*). And in a minute of sale of woods, in which a certain portion of them was reserved, the seller was not allowed to prove by parole that an additional part had been reserved verbally (*z*).

§ 156. Witnesses are also inadmissible to add stipulations to a written contract. This was held where one who had purchased at a sale by auction alleged that the auctioneer stated that on the lots being knocked down, they were to be held as delivered, there being no such condition in the articles of roup (*a*). And a similar decision was pronounced in England, where it was alleged that the auctioneer in a sale of timber had verbally warranted the lots as containing a certain quantity of wood, the articles of sale being silent on the point (*b*). Thus also where there is a written lease the landlord may not prove by witnesses an additional obligation by the tenant to build houses (*c*), or to pay for summer fallow left on the farm by the outgoing tenant (*d*).[6] And where the parties had executed a written contract of sale of grain, it was held incompetent to prove a verbal obligation on the seller to carry the grain twenty miles beyond the place where he delivered it (*e*). On the same principle, a party is not entitled to add to missives of a sale of heritage a verbal agreement to hold the contract rescinded, if the price should not be paid within six years (*f*). And where there was a written agreement to furnish cast-iron pipes at a certain rate, it was held incompetent to prove by parole a verbal stipulation fixing the quantity (*g*). This case stands distinguished from one noticed above (*h*), in which, the duration of a lease having been blank in the written missive on which the tenant possessed, the Court allowed the term (which was evidently longer than one year) to be explicated by parole. In the latter case a duration of some period had to be imported into the contract; and therefore the deed could

(*y*) Weston *v.* Emes, 1808, 1 Taunt., 115. (*z*) Kendal and Co. *v.* Campbell, 1766, M., 12,351. (*a*) Lang *v.* Bruce, 1832, 10 S., 777. (*b*) Powel *v.* Edmunds, 1810, 12 East., 6—See also Jones *v.* Edney, 1812, 3 Camp., 286.

(*c*) Maxwell *v.* Burgess, 1773, M., 12,351. The proof tendered included relative admissions of the tenant. (*d*) Alexander *v.* Gillon, 1847, 9 D., 524.

(*e*) Brisbane *v.* Glasgow merchants, 1684, M., 12,328. (*f*) Baptist Churches *v.* Taylor, 1841, 3 D., 1030. (*g*) Pollock *v.* M'Andrew, 1828, 7 S., 189.

(*h*) M'Leod *v.* Urquhart, 1808, Hume D., 840.

[6] Or to put up fences; M'Gregor *v.* Strathallan, 1862, 24 D., 1006.

not exclude extrinsic proof on that point. But in the former case the documents without the verbal addition constituted a complete contract, fixing the price of the iron which should be taken, but leaving the quantity to the purchaser's option; and therefore the parole proof tendered would have materially altered the nature of that transaction.

§ 157. The principle thus illustrated excludes not only parole, but all extrinsic evidence (except writ or oath of the party) by which the legal construction or effect of a deed might be modified. Thus a party may not impugn his obligation by shewing he was not bound in law to undertake it (*i*). And (unless fraud is alleged) previous communings and correspondence are inadmissible to modify the obligations under a deed (*k*), or to negative the consideration on which it bears to proceed (*l*).[7]

§ 158. So a formal deed may not be added to or modified by an antecedent minute between the parties (*m*)[8]; and the legal con-

(*i*) Higgins *v.* Livingstone, 1816, 4 Dow, 341—Jaffray *v.* Robertson, 1712, M., 12,337—Ross *v.* Stirling, 1816, 4 Dow, 442, (Irish). (*k*) Miller *v.* Miller, 1822, 1 Sh. Ap., 308—Clark *v.* Burns, 1835, 13 S., 338—Hughes *v.* Gordon, 1819, 1 Bligh, 287—Stevenson *v.* Moncrieff, 1845, 7 D., 418. (*l*) Stewart *v.* Stewart, 1842, 1 Bell's Ap., 796. (*m*) Sivright *v.* Borthwick, 1828, 7 S., 210—E. Fife's Tr. *v.* Duncan, 1824, 3 S., 241—Carruthers *v.* Thomson, 1836, 14 S., 464.

[7] When parties have reduced their respective undertakings and obligations into writings, and these writings do not form a completed contract, as in the case of an offer and acceptance which do not correspond, it is incompetent to prove verbal communings with the view of proving that parties had come to a complete understanding and agreement. Thus where, in answer to a written offer for the sale of lands, an intending purchaser wrote that he accepted the offer on a certain understanding in reference to certain matters, to which no reference was made in the offer—it was held that the offer and acceptance did not form a completed contract, and that it was incompetent to prove that the understanding in the acceptance referred to verbal representations made by the offerer prior to the offer; Johnston *v.* Clark, 1855, 18 D., 70. With this compare the case of Colquhoun *v.* Wilson, in which, when a written offer to take lands in feu was accepted with certain conditions, and the offerer took possession and executed operations on the lands, which were held to be beyond the power of a tenant, and to be acts of proprietorship, it was held that a completed contract was not constituted by the letters, that it was incompetent to prove the offerer's verbal assent to the conditions mentioned in the acceptance, but that the incomplete contract was rendered binding *rei interventu*, and that the conditions in the letter of acceptance were binding conditions of the contract; Colquhoun *v.* Wilson's Trustees, 1860, 22 D., 1035.

In an action on a contract for haulage at so much per horse, the number of horses not being mentioned in the contract, it was held incompetent to prove that there had been a list of horses made out, on which list, though it was not mentioned in the contract, the contract proceeded; Walker *v.* Caledonian Railway Co., 1858, 20 D., 1102.

[8] See M'Alister *v.* Gemmil, 1862, 24 D., 956—*supra*, § 121, note 11.

struction of a patent of peerage may not be altered by referring to the marriage-contract on which it proceeded (*n*). On the same principle it was held that, where a lease had been sanctioned by and embodied in an Act of Parliament, the preliminary contract between the parties (two railway companies) could not be read as sanctioning a voidance in a certain event (*o*). Thus, also, in construing a statute no regard can be had to the standing orders of the House of Commons (*p*), or to the discussions in Parliament before passing the bill, or to the bill as differing from the Act itself (*r*). It follows, that where there is a regular deed between parties, a separate contract as to matters within its provisions cannot be gathered by slight inferences from writings and actings, especially if dated before the document (*s*).

§ 159. On the same principle a formal decree-arbitral may not be modified by referring to the notes previously issued by the arbiter to the parties, because before pronouncing the decree he may have altered the views which the notes embody (*t*). And if it bears to proceed on grounds within the submission, or on the whole circumstances, the notes may not be used to shew that the arbiter went partly on data beyond the submission (*x*). Yet where an *error calculi* is alleged, it would seem that the preliminary notes, containing the detailed findings and the data on which the decree proceeded, may be looked at (*y*). In some old cases arbiters were examined in order to explain their ambiguous awards (*z*). But this has been properly refused in later decisions (*a*). And, although in

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(*n*) Annandale peerage case, noticed by Lord Moncrieff in Blair *v.* Blair, 1849, 12 D., 109, and in Lockhart *v.* M'Donald, 1840, 2 D., 424—See also Innes *v.* Kerr, 13th Nov. 1810, F.C., as noticed by Lord Moncrieff in these cases. (*o*) Stirling and Dunfermline Rail. Co. *v.* Edinburgh and Glasgow Rail. Co., 1852, 14 D., 747.

(*p*) North British Rail. Co. *v.* Tod, 1845, 5 Bell's Ap. Ca., 184, reversing 8 D., 726.

(*r*) Allan *v.* Edinburgh Parochial Board, 1849, 11 D., 1391—Bridges *v.* Fordyce, 1844, 6 D., 968; affirmed, 6 Bell's Ap., 1. (*s*) Alexander *v.* Gillon, 1847, 9 D., 524—Hughes *v.* Gordon, 1819, 1 Bligh, 287. (*t*) Ferguson *v.* King, 1828, 6 S., 1006—Mackenzie *v.* Girvan, 1840, 3 D., 318—Brackenrig *v.* Menzies, 1841, 4 D., 274, and 14 Scot. Jur., 109—Laing *v.* Brown, 1852, 15 D., 38—Runciman *v.* Craigie, 1831, 9 S., 629—Bankt., 1, 23, § 22. (*x*) Cases in preceding note compared with Steele *v.* Steele, 22d June 1809, F. C., and Bell *v.* Halliday, 1825, 4 S., 286, see *infra*, § 184. (*y*) Morrison *v.* Robertson, 1825, 1 W. S., 143. (*z*) Fleming *v.* Fleming, 1555, M., 624—Pharnehest *v.* Moscropt, 1611, M., ib.—Hays *v.* Hay, 1671, M., 12,319—Grant *v.* Grant, 1679, M., 10,439, 40—Davidson *v.* T. of Edinburgh, 1684, M., 12,327. All these cases occurred before the Act of Sederunt, 29th April 1695, § 25, declaring decrees-arbitral reducible only on the grounds of corruption, bribery, and falsehood. (*a*) Williamson *v* Dinwiddie, 1777, 5 Sup., 428—Woddrop *v.* Finlay, 1794, M., 628—Bankt., 1, 23, § 22.

the special case of a judicial reference to the arbiters named in a contract which takes the parties bound to refer their disputes, the Court may remit to the arbiters to explain their award, or even to reconsider it with a view to certain objections (*b*),—the general rule is, that a decree-arbitral, like any other finished writ, must stand or fall on its own merits, and must be construed by itself (*c*). This, however, does not exclude the examination of the arbiters on questions of fact regarding the regularity of the proceedings, as whether they decided without hearing parties or allowing a proof, or whether they differed before devolving on the oversman (*d*).[9]

§ 160. Where parties have by missives or correspondence bound themselves to enter into certain obligations by a formal deed, these documents are admissible on the question, whether the deed as extended but not yet executed embodies the agreement. But in order to be binding, the antecedent documents must prove a concluded intention to contract, the deed being only required for giving technical effect to it (*e*). A draft adjusted by the parties may also be used in such questions, although the consequence may be to break off the agreement (*f*).

Except in such special cases, however, an extended deed may not be contradicted by reference to the draft; because, if they differ, there is a presumption *juris et de jure* that the draft was departed from, and the deed agreed to as extended (*g*).[10] So the testator's instructions to his agent cannot be used in order to modify the construction of a regular will (*h*), or to alter the proper meaning of the

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(*b*) Reid *v.* Walker, 1828, 7 S., 82. In a regular judicial reference, a remit to the arbiter to explain his award was made, but only of consent of parties; Anderson *v.* Pott, 1833, 11 S., 778. (*c*) Cases in the preceding notes (*t*), (*a*), and (*b*). See also M'Nair *v.* Gray, 1831, 5 S., 735; affid., 5 W. S., 305. (*d*) See Carse, Acts of Sederunt, 17th Dec. 1783 and 10th Aug. 1784—Arthur *v.* Callin, 1773, M., 667; Hailes, 534, S. C.—See Colquhoun *v.* Corbet, 1784, (H. of Lords) 2 Pat., 626.

(*e*) Campbell *v.* Ralston, 1842, 4 D., 1310—Mills *v.* Albion Ins. Co., 1827, 5 S., 930; affid., 3 W. S., 218—See also Hamilton *v.* D. of Queensberry's Exrs., 1833, 12 S., 206.

(*f*) Dallas *v.* Fraser, 1833, 11 D., 1058. (*g*) Drysdale *v.* Johnstone, 1839, 1 D., 413, per L. Gillies. (*h*) M'Leod *v.* Cunningham, 1841, 3 D., 1288.

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[9] It is competent, in order to determine whether a decree of absolvitor from the conclusions of an action as laid, supported the defence of *res judicata* in a second action, to read the opinions of the Judges at advising to ascertain the meaning and scope of the decree founded on; Glasgow, Airdrie, and Monkland Junction Railway Co. *v.* Drew, 1861, 23 D., 835.

[10] The deed in the case quoted was not only extended but executed.

term "heirs" under it (*i*). In one case the instructions to the agent (admitted to have been his only guide in preparing the deed) were used in order to fill in the name of a legatee which had been omitted (*k*). But this case (as it has been reported) is more than questionable (*l*).

§ 161. In the cases hitherto noticed, the party's object in tendering the proof was to shew that the writing did not correctly or fully set forth the stipulations originally agreed to. It is a different, and often a difficult, question, whether the averment that obligations constituted by writing were modified by a subsequent verbal agreement, may be proved by witnesses. The principles which exclude parole to affect a written contract as *ab initio* do not apply to such a case. And the only ground on which the evidence could be rejected is, that an obligation which has been constituted by writing cannot be extinguished by parole. But the latter principle is of a much more limited character than the former; and for the obvious reason, that although it must be presumed that parties make their written contract the only measure of their obligations, they not unfrequently agree to alter and modify these afterwards without executing a new deed. The Court have had considerable difficulty in dealing with this class of cases, which have not yet been cleared up by decisions.

§ 162. On the one hand, it has been held incompetent to lead parole proof of an agreement altering a deed, where the adducer does not offer to prove acts of possession by the other party under the new agreement, or mutual actings upon it, or circumstances which shew that it was adopted and proceeded upon by the other party; whereas a proof of facts and circumstances of these descriptions has repeatedly been admitted. Thus a vassal who was prohibited by his feu-charter from building ale-houses, was not allowed to prove by witnesses that his superior consented to his using one of the buildings as an hotel (*m*). And parole was held not admissible to prove that written instructions to a stock-broker to purchase shares had been altered verbally (*n*). And in a summary petition by a master against a servant for having deserted his employment,

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(*i*) Blair *v.* Blair, 1849, 12 D., 97. As to parole for explaining the term "heirs," see next Title. (*k*) Pollock *v.* Gilmour, 1777, M., 8098, and M., Legacy Appx., No. 1. (*l*) Per L. Cockburn in Blair *v.* Blair, *supra*—Hunt *v.* Hort, 1791, 3 Br. C. C., 311. (*m*) Scott *v.* Cairns, 1830, 9 S., 246. (*n*) Stevenson *v.* Manson, 1840, 2 D., 1204.

where the master alleged that a written contract of service for seven years at thirty shillings per week of wages had been renounced, and a new one at twenty-five shillings had been substituted for it, the Court held that the allegation could not be proved by parole (*o*). They have also rejected parole of the averment that a legacy which had been left by writing had been revoked verbally (*p*); and in several cases it has been held that renunciation of rights and obligations constituted by writ could not be proved by parole evidence (*r*). A similar view is also seen in a case where the landlord in a written lease, which stipulated that the rent should be paid fore-hand, alleged that the lease had fallen in consequence of the tenant having intimated his inability to comply with that condition. The Court held that the intimation could only be proved by the tenant's writ or oath (*s*).[5]

§ 163. The strict rule which these decisions indicate was relaxed in the following cases. Where one alleged that a written contract to fish and cure herrings at a certain specified rate had been abandoned by mutual consent, and that a new contract with a different stipulation as to the price had been agreed to, the case was sent to a jury, and on the trial the Lord Chief Commissioner admitted parole of facts and circumstances to prove the new agreement, of which no direct evidence was tendered. His Lordship, however, observed, "To do away with a written agreement the proof must be solemn and clear, and I shall watch it" (*t*). Again, where a contract for raising a certain quantity of ironstone at a specified rate per ton payable fortnightly had been entered into by written missives, and the work had been performed, and payment had been made for the first half at a specified rate and for the second half at a lower rate, the Court, in an action for payment of the difference of the second half, held that it was competent to prove by parole that it had been raised at the lower rate under a

(*o*) Dumbarton Glass Co. *v.* Coatsworth, 1847, 9 D., 732. See *infra*, § 166.

(*p*) Houston *v.* Houston, 1631, M., 12,307—Whitefoord *v.* Aiton, 1742, M., 8072.

(*r*) Ker *v.* Sheddan, 1737, Elch. "Locus Penitentiæ," No. 3—Countess of Argyle *v.* Sheriff of Moray, 1583, M., 12,300—L. Craigmillar *v.* Chalmers, 1639, M., 12,308—Hunter *v.* Dunn, 1809, Hume D., 584—Brody *v.* Cromarty's Crs., 1688, M., 12,328—Erak., 3, 3, 8—Tait, 325. (*s*) Smith *v.* Robertson, 1831, 9 S., 751.[5]

(*t*) Craig *v.* Budge, 1823, 3 Mur., 320. The jury found for the defender, who maintained the original contract. See also M'Intosh *v.* M'Tavish, 1828, 6 S., 992.

[5] The Court refused to allow a proof at large of the intimation, but they held that the tenant had offered the rent *debito tempore*.

verbal contract, which in that respect altered the original written agreement (*u*). Their Lordships were a good deal influenced by the fact that the action had not been brought till the working under the contract had come to an end. A similar decision was pronounced in a recent case (*w*), where a tenant founded on a written lease for fifteen years, which stipulated for a grain rent convertible into money at the fiar's prices, but the landlord contended that after four years' possession the parties had agreed verbally that the rent should be fixed in money at a sum, which until the year before the case arose had been considerably less than the converted value of the original grain rent. In support of his allegation, the landlord founded on certain letters written by the tenant craving a reduction of rent, and on the receipts for rent during nine years, none of which made reference to a grain rent; but he did not produce any proper writs of the tenant proving the alleged alteration on the contract. The evidence, however, was held to prove that there had been an alteration by agreement, and not merely by favour of the landlord. The Court treated the case (which came up by advocation from a Sheriff Court) as a jury question, and while considering that "it is always a hazardous proceeding to allow a deviation from the terms of a written agreement, and one which requires strong proof," they held that the proof was sufficient for the purpose.

§ 164. This is an important case, especially as it occurred with a purchaser from the party who had granted the lease, and with whom the alteration had been arranged. It is thought not to conflict with a previous decision (*x*), where a tenant maintaining that his rent under a written lease had been abated by verbal agreement, failed to satisfy the Court that the abatement was more than voluntary on the part of the landlord. In another case (*y*), however, where a tenant pursuing his landlord for wrongous sequestration, craved an issue whether the rent under his written lease had been altered by a verbal agreement, the Court before sending the case to trial took the unusual course of deciding by anticipation on the mode of proof; and, finding that the tenant did not aver any written agreement modifying the lease, held that it was incompetent to prove that fact by parole. This decision was pronounced with special reference to the terms of the condescendence, which

(*u*) Thomson *v.* Monkland Steel Co., 1836, 14 S., 393. (*w*) Baillie *v.* Fraser, 1858, 15 D., 747. (*x*) Gibb *v.* Winning, 28th May 1829, F. C., and 7 S., 677, S. C., noticed in Baillie *v.* Fraser, *supra*, per Lord Ivory. (*y*) Law *v.* Gibsone, 1835, 13 S., 396.

showed that the tenant meditated a general proof by witnesses, and had no specific case of acting upon and taking payment under the new lease, as in one of the decisions mentioned above. The Court seem to have considered that the agreement to abate might have been proved by "facts and circumstances."

Again, where a contract of copartnery provided that a certain partner was to bear his proportion of the loss, the House of Lords held that the circumstances, including the conduct of the partners, omission to claim, and inconsistent representations throughout a long litigation, proved either that the real intention of parties had been different, or that a new agreement had been entered into (*y*).

§ 165. The result of these cases seems to be, that although parole is in general inadmissible to prove that a written contract has been abandoned or altered by a subsequent verbal arrangement, yet if the actings of the parties clearly show that this is the case, the Court will not maintain the writing against the real facts. In such cases, also, direct testimony will be admitted to expiscate the terms of the new agreement, care being taken not to place much reliance on the recollection of the witnesses as to its precise terms.

§ 166. But where a contract, which in its own nature requires writing, has not merely been modified or limited without its identity being impaired, but has been altered in an essential part, so as to have become substantially a new contract, it is manifest that no evidence except writing will be received to prove the second agreement; for the rule which would have excluded parole of the obligation originally, is not obviated by the fact of there having been a previous contract between the parties relating to the same matter (*z*). Thus it is fixed in England that in contracts for which the Statute of Frauds prescribes writing, alterations of this nature require the same kind of proof; *e.g.*, where it was alleged that an alteration had been made on the time of delivery under a contract of sale (*a*); and where one port was said to have been substituted for another in a contract of ship insurance (*b*). The same principle

(*y*) Geddes *v.* Wallace, 1820, 2 Bligh, 270—See also Maule *v.* Robb, 1807, Hume D., 835—Hay *v.* M'Teir, noted ib., 836—Aglionby *v.* Watson, 1809, ib., 845, as to proving by facts and circumstances that the landlord waived his right under a clause in the lease excluding assignees and subtenants. (*z*) This principle is brought out *e contrario* in the case of Pollock *v.* M'Andrew, 1828, 7 S., 189, *supra*, § 156; where it was observed by Lord Glenlee that if the party had alleged that the number of pipes had been fixed by a subsequent verbal agreement, that might have been proved by parole. (*a*) Marshall *v.* Lynn, 1840, 6 Mee. and Wel., 109. (*b*) Leslie *v.* De la Torre, cited 12 East., 583—White *v.* Parken, 12 East., ib.—2 Phil., 356—Taylor, 751.

is seen in a case of alleged alteration on a written contract of service, of which more than a year had still to run (*c*). So the principle that until a lease for a longer period than one year has been reduced into writing or followed by *rei interventus*, either party is entitled to resile, may render parole proof of an alteration on the terms of a written lease unavailing, unless it embrace actings or possession under the new contract. And upon this view the cases above noticed of alteration as to the rent stipulated under a written lease may be reconciled, although the reports do not so distinguish between them.

§ 167. In cases which in their own nature require written evidence, a distinction must also be taken between proving the alteration in order to show that the original contract has been abandoned, and proving it to constitute a new contract; oath of party being always competent for the former purpose, but incompetent for the latter, unless *rei interventus* has ensued on the contract as so altered (*d*).[11]

(*c*) Dumbarton Glass Co. *v.* Coatsworth, 1847, 9 D., 782, *supra*, § 162.

(*d*) See *infra*, § 242.

[11] On this subject, viz., the effect of a verbal agreement to waive or modify a written agreement, it is thought that the law deducible from the opinions delivered in the House of Lords in the recent and important case of Wark *v.* The Bargaddie Coal Co., may be stated to be in substance as follows:—An agreement to waive or modify a written stipulation may be competently and completely *proved* by parole evidence alone, parole evidence being, for this purpose, as competent as oath of party, and differing from it only in probative force, and not in competency. But a verbal agreement to waive or abandon a written stipulation, whether proved by parole or by oath of party, is not binding although it be proved. Either party may resile from the verbal agreement and insist on standing by the written agreement; and, therefore, an averment that there has been a verbal agreement to waive or modify a written stipulation, is, if unsupported by any further averment, irrelevant, and will not entitle the party making it either to an issue or to a reference to the oath of his opponent; since, although the verdict or oath were in his favour, he nevertheless could not succeed, because there would still remain to his opponent a *locus penitentiae*. But if to the averment of verbal agreement to waive or abandon a written stipulation, there be added averments that acts amounting in law to *rei interventus* have followed on the verbal agreement, then such averments will warrant an issue whether the things complained of, as in violation of the written agreement, were done with the consent of the person who complains of them, and the pursuer of that issue will not be restricted in that proof to the writ or oath of his opponent, but may use all the ordinary methods of proof; and if he give sufficient evidence of the *rei interventus*, and of the verbal agreement, then the verbal agreement will be as obligatory and effectual as if it had been embodied in writing. But although these propositions seem warranted by the judgments delivered in the House of Lords, it may perhaps be doubted whether that case can be regarded as establishing them to their full extent as principles of Scotch law; as views of the exact import and effect of

§ 168. It will also be kept in view that while verbal modifications (in whatever way they are proved) may be maintained against

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the judgment, not apparently entirely uniform and consistent, have been expressed on the bench.

The action was founded on an alleged violation of a lease of minerals. All the minerals in the lands of Bargaddie were let by a written lease, but the tenants engaged to leave a barrier between the Bargaddie and the adjoining mineral fields. The tenant worked out, at certain places, the barrier between Bargaddie and the adjoining mineral field of Bredisholme; and the action raised by the proprietor of Bargaddie was founded on this violation of the lease. The tenant stated in defence that the landlord had verbally agreed to waive the stipulation about the barrier, and that he, the tenant, had removed it accordingly in the knowledge and with the acquiescence of the landlord. The Court of Session thought that this statement involved two separate defences, the one founded on the verbal agreement, supported by *rei interventus;* the other on the landlord's acquiescence, apart from, and falling to be dealt with, as unconnected with the verbal agreement; and they held that there were no sufficient averments to support this latter defence. With regard to the former defence, the Court held parole proof of the alleged agreement incompetent; and, that being so, they held it illogical and incompetent to found on the *rei interventus* in support of the verbal agreement. To do so, the Lord Justice-Clerk (Hope) observed, would be to reason in a circle; because, before the actings of parties could be referred to the verbal agreement, it was necessary to prove that agreement independently of these actings, which, *ex hypothesi*, was incompetent, there being admittedly no written proof. But in the House of Lords this mode of dealing with the defender's case was disapproved of, and it was held that the defence could not be separated as was done in the Court of Session, but that all the grounds of it ought to be considered together. The House agreed with the Court in holding that a written agreement could not be varied or waived by words only, because, so long as matters were entire, there remained a *locus penitentiae* to the person consenting to the variation or waiver; but their Lordships held that, if there had been *rei interventus* following on such a parole agreement, the agreement was no longer revocable, but became as binding as if it had been made in writing. The Lord Chancellor (Chelmsford) observed that the appellants might very well say that, although separately these two things, consent and acquiescence, might be insufficient, "yet *juncta juvant*"; and the House remitted the cause with a declaration that the Court ought to have directed an issue "Whether the barrier coal was worked and removed with the consent of the pursuer?"

This case has been more than once explained from the bench, and it is important to keep in view the opinions which have been expressed of its meaning and effect. In the recent case of Sutherland *v.* Montrose Shipbuilding Co., Lord Cowan observed that the judgment of the House of Lords in the case of Wark went no further than this, that "acts of acquiescence at variance with the terms of a written agreement may be the subject of parole proof"; and, in the same case, the Lord Justice-Clerk (Inglis) stated his understanding of the law applied in the case of Wark to be "that, where there are averments of acquiescence in operations inconsistent with the terms of the written contract, they may be admitted to proof; and, if it appear that the acquiescence was the consequence of a previous arrangement, that it is then competent to prove that arrangement." Still more recently, Lord Deas observed that what was decided in the House of Lords was, that the proof of the alleged consent "was not limited to the landlord's writ. The alternative of the landlord's oath, so far as we can see from the reports, was not suggested by the parties." On the other hand, the view taken by Lord Curriehill

either of the parties to the original contract, they will be unavailing as against a purchaser or other third party who is entitled by law to rely on the written title (*e*).

§ 169. Of course the rule by which extrinsic evidence is inadmissible to add to the stipulations of a deed, does not apply to matters collateral to the document; because on these there is no written agreement between the parties. In such questions, therefore, the nature and object of the writing must be considered, so that on the one hand obligations or conditions may not be added to a deed designed for recording all the agreement which the parties made on a particular subject,—while on the other hand a writing intended to embrace only certain branches or stipulations of an agreement ought not to be stretched to matters beyond its purvieu;

(*e*) So held where a verbal statement of rent due under a written lease was pleaded against a purchaser of the lessor; Riddick *v.* Wrightman, 1790, Hume D., 776—Grant *v.* Watt, 1802, ib., 777, note.

was, that the ground of decision was in effect that the piece of ground upon which the operations complained of took place was not included in the lease at all,—an opinion founded, probably, on the consideration that, although the whole of the minerals in Bargaddie were *ex figura verborum* included in the lease, the tenants were restricted from working that part of them to which the action referred. Bearing in view these interpretations of the judgment of the House of Lords, it seems doubtful how far it can be affirmed that parole evidence of an agreement to waive or modify a written stipulation in regard to land is competent and sufficient to establish the existence of the agreement, and that the agreement so established is irrevocable and effectual if *rei interventus* have followed on it. At all events the principle cannot be extended to the constitution of a contract relative to land. A verbal contract relative to land cannot be proved by parole, but by oath of party only; while, if so proved, it will be obligatory if followed by *rei interventus*. Hence, if a party aver a verbal contract, and acts constituting *rei interventus* following on it, he will, at least if he prove the *rei interventus*, be entitled to refer to his opponent's oath whether there was such a verbal agreement; but he will not be entitled to a proof at large of the agreement. Nor, probably, could the principle in the case of Wark be applied to the case of a modification of a written contract so essential as truly to create a new contract. In such a case, the party alleging the change would probably be confined to his adversary's writ or oath. Thus, since the judgment in the case of Wark, it has been held incompetent to establish by parole evidence a verbal lease for 999 years; and, in another case, it was held incompetent to establish by parole an agreement to allow the builder of a ship two months longer than the time stipulated in a written contract, but in this latter case it was held that there was no *rei interventus*; Wark *v.* Bargaddie Coal Co., 1856, 18 D., 772; reversed 1859, 3 Macqueen, 467, and 31 Jur., 323 and 767—Sutherland *v.* Montrose Shipbuilding Co., 1860, 22 D., 665, 671, 673—Gowan's Trs. *v.* Carstairs, 1862, 24 D., 1382. The case of Gowan's Trustees has been appealed. See also Edmondston *v.* Bruce, 1861, 23 D., 995; and Granger *v.* Geils, 1857, 19 D., 1010, opinion of Lord Deas.

for, if it were, extrinsic evidence would be excluded on matters which the parties purposely left to be expiscated by that means.

The most prominent illustrations of this principle occur where the writing is a short memorandum, in which only certain points of the contract are recorded. Thus in an English case where soon after the sale of a horse the seller had given the purchaser a paper in these words, "bought of G. P. a horse for the sum of £7, 2s. 6d., G. P.," and the purchaser averred that there had been a verbal warranty, parole of the warranty was admitted, on the ground that the paper had been intended merely as a memorandum of the transaction, or a receipt for the price, and not as a written contract of sale (*f*). So in an action for not taking proper care of a horse, which had been hired upon a memorandum in pencil on a card in these terms, "Six weeks at two guineas, W.W.," Lord Ellenborough admitted parole to prove that at the time of the contract it had been stipulated that, as the horse had a habit of shying, the person who took it on hire was to be liable to all accidents (*g*). His Lordship's opinion well illustrates the rule applicable to these cases:—"The written agreement merely regulates the time of hiring and the rate of payment; and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms; but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as part of the agreement."

§ 170. The application of the same principle to writings of a more elaborate nature will be seen from the following illustrations. The agent for a landlord having written to a proposing tenant, accepting his offer for a farm which had been advertised, and the offerer having afterwards signed a minute or memorandum prepared at a meeting with the agent, and containing the subordinate stipulations of the intended lease (which memorandum he alleged had also been signed by the agent), the landlord refused to complete the arrangement. An action having then been raised at the instance of the proposing tenant against the landlord and agent, the landlord was assoilzied on the ground that he had not authorised his agent to conclude a lease, and the agent was allowed to prove by parole the offerer's understanding that he had only authority to make a bargain subject to the landlord's approval (*h*). So in an

(*f*) Allen *v.* Pink, 1838, 4 Me. and Wel., 140–144; 6 Dowl., 668, S. C.

(*g*) Jeffrey *v.* Walton, 1816, 1 Starkie R., 267. See a doubtful case on this point; Cheap *v.* Philip, 1666, M., 12,312, questioned by Tait, 334. (*h*) Dodds *v.* Walker, 1822, 2 S., 81. The action was for implement as against the landlord, and failing that, for damages as against the agent.

English case where the assignment of an indenture bore, as the consideration, that £3, 10s. had been paid by the old master to the new, it was held competent to prove that the old master had received the money from the parish funds to make the payment (*i*). Again, where a father and son had been joint tenants under a written lease, the father's executors were allowed to prove *prout de jure* that the crop and stocking had belonged to him exclusively, although, in cases of joint tenancy there is a presumption that the crop and stocking are joint property (*k*). The ground of this decision evidently was, that the written lease was intended for fixing the obligations of the tenants as regarded the landlord, and not for embodying a contract between the lessees as to their respective interests. The same principle is strongly manifested in two older cases: in which the question was how one of the joint obligants in a bond could prove that he was only bound as a cautioner, where the question occurred with those in right of the other obligant (*l*). In the one case the party alleging he was cautioner was allowed a proof before answer, in which he showed that the money had been paid to, and applied to the use of, the other party, and that several communings had taken place between them with a view to the latter granting a bond of relief. Upon this the Court, by a narrow majority, found that the allegation was proved (*m*). In the other case referred to, the Court "had no doubt of the competency of a proof by facts and circumstances," in order to show that one of the joint obligants (who had paid the debt and claimed to rank for the whole sum in the bankrupt estate of the other) was truly a cautioner; and on considering the proof they found the averment to be substantiated (*n*).[12]

Some further illustrations of this principle will be found in a previous section on the necessity for producing the written contract, when the matter in issue is collateral to it (*o*). The cases on the

(*i*) R. *v.* Inhabitants of Llangunno, 1831, 2 B. and Ad., 616. (*k*) Kilpatrick *v.* Kilpatrick, 1841, 4 D., 109. (*l*) Such a proof is incompetent as in a question with the creditor; *supra*, § 154. (*m*) Drummond *v.* Nicolson's Crs., 1697, M., 12,829. (*n*) Smollet *v.* Bell and Rannie, 1793, M., 12,354. See also per Lord Cuninghame in Lindsay *v.* Barmcotte, 1851, 13 D., 725. (*o*) *Supra*, § 121. In Harrowar *v.* Wells, 1749, Elch. "Prescription," No. 31, a verbal bargain setting hay in steelbow for nineteen years was allowed to be proved at the end of that period, although there was a written lease of the same duration which did not contain any clause to that effect.

[12] Proof that a party appearing *ex facie* of an invoice the vendor, was not so, admitted,

converse rule, that stipulations cannot be added by parole to a writing which embodies the whole contract, have also been noticed (*p*).

§ 171. Where the party founding on a deed admits on record, or by writ or oath, that it does not contain a true account of the transaction, the door will be opened to extrinsic proof of the facts, and to parole, if their nature admits of that mode of proof. In such a case the deed is (to the extent of the admission) collateral to the real contract, and inconsistent with it.[13]

On this ground where the granter of an absolute disposition, which narrated payment of a price, sued the grantee for a balance of the price as still unpaid, the grantee was allowed to prove *prout de jure* his defence that the transaction had really been a security for advances (*r*). Thus also where it is proved by writings under the hand of the disponee in an absolute conveyance, that it was a trust for some purpose, the terms of the trust may be expiscated by the trustees' judicial examination (*s*), by facts and circumstances (*t*), and even by parole proof (*u*). So where the creditor in a bond admitted in his oath on reference that the consideration was the price of a mare, it was held that a latent defect in the animal might be proved by parole (*x*). And in an action on a bond in which the consideration set forth was borrowed money, the Court allowed a proof by oath that it had been granted for the price of a horse, and by witnesses that the creditor had agreed to uphold the horse, whereas it was not in sound health (*y*).

§ 172. On the same principle when it is admitted on record or by writ or oath, or appears from the deed itself, that it was executed on a certain condition, parole of non-implement of the condition is admissible.[14] For example, in an action on a bond for the

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(*p*) *Supra*, § 156. (*r*) Miller *v.* Oliphant, 1848, 5 D., 856.

(*s*) Muir *v.* Gemmel, 1805, Hume D., 842. (*t*) Davidson *v.* Aikman, 1805, M., 14,584, 1 Dow, 1; 2 Bligh, 529, S. C.—Small *v.* Spence, 1838, 12 S., 42.

(*u*) Stewart *v.* Stewart, 1777, 5 Sup., 631, Hailes, 762, S. C. (*x*) Sim *v.* English, 1674, M., 12,321. (*y*) Kinnaird *v.* M'Dougal, 1694, 4 Sup., 184—See Brown *v.* Lawrie, 1676, M., 12,324, which illustrates the same principle.

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because the invoice was not necessarily the contract of parties; Holding *v.* Elliott, 1860, 5 H. and N. Exch., 117.

[13] Blackwood *v.* Hay, 1858, 20 D., 631.

[14] In an English case it was held competent to prove by parole that parties before they signed a contract had agreed that it was not to operate as a contract, except on fulfilment of a condition, because, although proof to contradict or vary the terms of an admitted agreement be incompetent, it may be proved that a document was never

price of certain deals, where the defence was that the creditor had agreed not to ask payment if he sold more at the same place, and that he had sold more there, the condition was allowed to be proved *scripto*, and the selling in breach of it *prout de jure* (z). Thus, also, in a suspension of a charge on a bond, the Court, after proof by the creditor's oath that the bond had been granted as for an apprentice-fee, admitted parole evidence that the apprentice had been maltreated and put away when only half the stipulated time had expired (a). And in a suspension of a charge on a bond dated the same day as an indenture with the creditor as master, the Court, holding that the deeds were parts of one transaction, and that the indenture was the consideration for the bond, received parole evidence of the creditor's bankruptcy and consequent inability to implement the indenture (b). Notwithstanding the ancient dates of these decisions, they seem to be consistent with modern rules of evidence.

§ 173. It has been already observed (c) that a writing not signed by the parties may be made the record and measure of their contract, by their agreeing verbally to be bound by its terms. In such cases the main contract is verbal, the writing being only imported into it by a reference; and therefore all the verbal stipulations by which the parties modified the contract contained in the document may be proved by parole. Thus in an English case, where the printed catalogue in a sale by auction mentioned a dressing-case with silver fittings, the auctioneer was allowed to prove by parole that before the bidding for it began he stated that it had only plated fittings, and that as such the article was offered for sale; and the Court held that it lay with the jury to determine on what footing the sale had proceeded (d). On this ground, also, it is thought that when a tenant has continued in possession after the expiry of his written lease, either he or the landlord may prove by parole any deviation from the written contract, which is only *prima*

(z) Wilkies v. Gordon, 1618, M., 12,407.
(a) Aikman, 1665, M., 12,311.
(b) Gunn v. Fraser, 1714, M., 12,337.
(c) § 113.
(d) Eden v. Blake, 1843, 13 Me. and Wel., 614.

meant to be an agreement; Pym v. Campbell, 1856, 6 Ellis and Blackburn, 370—Wallis v. Littell, 1861, 31 L. J. C. P., 100; also, that an undated written contract was intended to operate not from the date of delivery but from a subsequent period; Davis v. Jones, 1856, 17 Scott's C. B., 625.

facie evidence of the terms of the verbal lease which has been engrafted on it (*e*).

§ 174. The rule which excludes extrinsic evidence in contradiction of a writing suffers an exception, where it is averred that the writing was not intended to be the record of a contract, but the cover of an ulterior transaction of such a nature that the parties would not have committed it to writing. Were extrinsic evidence not admissible to prove allegations of this kind, it would be impossible to bring such latent transactions to light; and one of the parties would succeed in using the deed as proof of an agreement essentially different from the true one. In such cases, also, evidence by witnesses must be received; because, if the allegations are true, there will probably not be written proof of them. Accordingly, parole and extrinsic evidence is admitted to prove that the consideration of a contract was illegal (*f*), or a *turpis causa* (*g*). And in a declarator of marriage founded on written acknowledgment, the defender may prove that the writing was not executed for the purpose of constituting marriage, but collusively in order to deceive certain persons into the belief that the parties were married (*h*).[15]

§ 175. On the same principle, when a deed is challenged as being a fraudulent device to defeat the rights of the granter's creditors, parole of the averment is admissible (*i*); and this holds where the case is laid on the statutes 1621, c. 18, or 1696, c. 5, for cutting down such transactions (*k*).

(*e*) See Tait, 222—*supra*, § 113. (*f*) Paxton *v.* Popham, 1808, 9 East., 407, 421—Collins *v.* Blantern, 1767, 2 Wils., 341—1 Smith's Lea. Ca., 153—Taylor, 748—2 Phil., 367. (*g*) Lundie *v.* Douglas, 1681, 2 Sup., 265.

(*h*) Stewart *v.* Menzies, 1841, 2 Rob., 547—M'Innes *v.* Moore, 1781, M., 12,683—Taylor *v.* Kello, 1786, M., 12,687—Maclauchlan *v.* Dobson, 1796, M., 12,693—Grant *v.* Mennons, 1812, Ferg. Const. Law Appx., 110—Jolly *v.* Macgregor, 1828, 3 W. and S., 85; and Campbell *v.* Kennedy, 1753, note to ib., 135—Campbell *v.* Sassen, 1826, 2 W. S., 309—Lockyer *v.* Sinclair, 1846, 8 D., 582—1 Fraser, 213, 4. (*i*) 2 Bell's Com., 244, 246—Cantach *v.* Rose, 1832, 10 S., 477—Horn *v.* Hay, 1847, 9 D., 651—Edmond *v.* Grant, 1853, 15 D., 703—M'Cowan *v.* Wright, 1852, 14 D., 968, and 15 D., 494. (*k*) 2 Bell's Com., 189, 191, 192—Glen *v.* Binnie, 1626, M., 12,551—Auld *v.* Smith, 1629, M., 12,552—Riddoch *v.* Younger, 1639, M., 12,544—Hamilton *v.* Boyd,

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[15] "The contract of marriage has this peculiarity, in which it differs from all other contracts, that, let the document containing a declaration of marriage be as clear as it may, the effect of it may nevertheless be taken off by proving that it was written and delivered with other intentions than of constituting marriage;" *per* Lord Justice-Clerk (Inglis) in Fleming *v.* Corbet, 1859, 21 D., 1034.

§ 176. The same principle admits parole and other extrinsic evidence to prove the allegation that the parties subscribing the deed did not adhibit a valid consent to it, as in reductions on the ground of force and fraud (*l*), or minority and lesion (*m*); and where it is alleged that the subscription was obtained on false pretences (*n*), or that when the deed was lying undelivered and blank in the date and disponee's name, a certain party unwarrantably took possession of it, and filled in his own name (*o*). So parole is admissible to shew that a deed bearing a regular attestation was not signed before witnesses (*p*). And on the same ground parole was received to prove that a bill had been granted on deathbed as a legacy, had not been delivered, and had been signed by the drawer after the acceptor's death (*r*).

On this principle also witnesses were admitted to prove that the grantee of a deed had fraudulently obtained the granter's subscription to it, without a clause which had been previously arranged between them, and the same proof was received to supply the omission (*s*). The fraudulent suppression of an important clause is equivalent to impetration of a deed which the party did not intend to grant. But the proof of fraud in such a case would require to be clear.

§ 177. Courts which have an equitable jurisdiction,—as all the Courts of law in this country,—may also admit parole evidence to control writings, where the challenger, without alleging fraud, directly impugns the deed as a fair record of the transaction, so that if his averments are true, the deed could not be enforced without violating the real contract between the parties. Thus where an assignation by the proprietor of an entailed estate bore to be absolute, both the Court of Session and House of Lords held that it was merely a right in security; the *ratio decidendi* being that this clearly appeared to be the real nature of the transaction from the circumstances, one of which was that the negotiation had proceeded

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1670, M., 12,555—Gibb *v.* Livingstone, 1736, 5 Sup., 897—Hailes, 100, M., 909, S. C. —M'Cowan *v.* Wright, *supra*—Edmond *v.* Grant, *supra*—Horn *v.* Hay, *supra*—Burton's Bank. Law, 144. (*l*) Barclay *v.* Barclay, 1674, M., 16,488—Stewarts *v.* Whitefoord, 1677, M., 16,489—Gray *v.* E. Lauderdale, 1685, M., 16,497—3 Starkie, 765.

(*m*) Crawford *v.* Bennet, 1827, 2 W.S., 608—L. Ballegarno *v.* Hay, 1683, M. 12,327. (*n*) Moses *v.* Craig, 1773, M., 12,352. (*o*) Fordel *v.* Caribber, 1677, M., 12,324—Menzies *v.* Hay, 1694, 4 Sup., 147. (*p*) See the chapter on the improbation of deeds, *infra*. (*r*) Farquhar *v.* Shaw, 1757, M., 12,341. The proof was led against an onerous indorsee. (*s*) Wilson *v.* Purdie's children, 1744, M., 12,339—Jones *v.* Statham, 1741, 3 Atk., 388.

on a proposal by the proprietor's agent for a loan on redeemable annuity (*t*). In giving judgment in this case Lord Cottenham observed, that the English Courts of Equity were familiar with the principles applicable to it. "If it were not competent for a Court of Equity to give effect to a transaction different from what the deeds executed represented to be the character of it, one of the most important branches of its jurisdiction would be cut off, and a security would be afforded to frauds which are now easily detected and defeated." "The only question is the intention of parties." "In ascertaining such intention it is competent for the Court to form its judgment upon the whole of the transaction, and upon evidence *dehors* the deed; such evidence being used, not for the purpose of putting a construction upon the deed, but of superadding an equity, controlling the estate and interest given by the deed." Again, where a party in Dundee wrote to a stock-broker in Glasgow, desiring him to purchase certain shares at £1, 3s., and the broker, finding them entered at that price in the Glasgow share list, replied that he had made the purchase,—in an action by the broker for £2, 3s. per share, the Court held that he was entitled to prove that the Glasgow lists had erroneously omitted to notice a call of £1 per share, that the purchaser knew that fact, and that the contract had really been made at 3s. per share of premium (*x*). This case comes within the principle well stated by Mr Greenleaf, that "parole is admitted to contradict or vary a writing where it is founded on a mistake of material facts, and it would be unconscientious or unjust to enforce it against either party according to its expressed terms" (*y*). Several cases have occurred in England illustrating the same rule, but involved in specialties as to forms of pleading. They bring out this principle, however, that a Court of Equity will not interfere, unless it be clearly convinced by the most satisfactory evidence, first that the mistake complained of really exists, and next that it is a mistake which ought to be corrected (*z*).

§ 178. The rule by which a written contract is conclusive, only applies in questions between the parties and those deriving

(*t*) Scottish Union Insur. Co. *v.* M. Queensberry, 1842, 1 D., 1208; affd., 1 Bell Ap., 183. (*x*) Carricks *v.* Saunders, 1850, 12 D., 812. The case having gone to a jury, resulted in a verdict for the pursuer; ib., 922. (*y*) 1 Greenl., 387.

(*z*) Taylor, 750, citing M. Townsend *v.* Stangroom, 1801, 6 Vesey, 329—Mortimer *v.* Shortall, 1842, 2 Drury and Warren, 371, per Lord Chancellor Sugden—Gillespie *v.* Moon, 1817, 2 Jonson, Ch. Ca. (American), 585, per Ch. Kent. On this subject, see also 1 Story's Eq. Jur., § 161, *et seq.*—Sugden on Vendors and Purchasers (1846), 238—Jones *v.* Statham, *supra*, § 176 (*s*).

right from them. Strangers may adduce all evidence which the nature of the facts admit of to modify, control, or add to the instrument; for they cannot be held bound by the terms of a deed, in the preparation of which they were not enabled to secure their own interests. There seem to be no Scotch authorities precisely fixing this rule. But it is firmly established in England (*a*).[16]

CHAPTER II.—OF THE ADMISSIBILITY OF PAROLE AND OTHER EXTRINSIC EVIDENCE TO EXPLAIN WRITINGS.

§ 179. The next rule as to the conclusive character of written evidence is, that the meaning of the parties to a deed must be gathered from the words of the deed itself, and from these only, to the exclusion of parole and other extrinsic proof of the intention of the parties. The duty of the Court in dealing with the document is not to discover the abstract or secret intention of the parties as contradistinguished from what they have expressed, but to construe and give effect to the words in which they have deliberately set forth their final intention. This rule is a necessary consequence of that illustrated in the immediately preceding chapter; for, unless the extrinsic evidence would support, it must conflict with and control the legal construction of the deed. In the one case it would be useless, and in the other the admission of it would be a violation of the rule referred to (*b*).

§ 180. Before considering this subject in detail, it is well to notice what constitutes the deed or other written expression of intention, to which the Court must give effect.

(*a*) 3 Starkie, 790—2 Phil., 354—Taylor, 756—1 Greenl., 356.

(*b*) On the general nature of this rule, see Bell's Pr., § 1694; per Lord Moncrieff in Blair *v.* Blair, 1849, 12 D., 109—2 Al., 509. The subject is copiously treated in the following books; Wigram on Wills (3d edition), 17, *et seq.*—1 Jarman on Wills, 349, *et seq.*—3 Starkie, 761—2 Phil., 276—1 Greenl., 354—Best on Ev., 246.

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[16] The rule that it cannot be proved, except by the writ or oath of the grantee, that a deed *ex facie* absolute was granted in trust, applies only when the question is between a truster, or one in his right, and a trustee, or one in his right; and was held not to apply in a case where a party, on being sued for a debt, averred that the pursuer was merely the trustee of another, who was the true creditor, and who had discharged the defender; Middleton *v.* Rutherglen, 1861, 23 D., 526.

The rule, then, does not confine the Court to the perusal of a single writing; for a contract often extends over a number of writings executed with reference to each other; and an unattested document is sometimes imported into a signed deed. Accordingly, when a deed refers to another document (*e.g.*, a list of debts, a specification, or a plan), as supplementing or illustrating its provisions, it will be construed in connection with that document; which by the reference is incorporated into and made part of it. This is the constant practice in regard to deeds which refer to plans (*c*); and Acts of Parliament containing similar references are construed in the same way (*d*). So when a contract for constructing a railway, machinery, or the like, refers to a specification of the work, or to a scale of prices, it is read as if the document referred to had been embodied in it (*e*). And written leases which bear reference to rules made by the proprietor for his whole estates, are treated as if these rules had been engrossed in each deed (*f*). On this principle, also, in a question whether a certain forest, which was not specified in an old decree of valuation of teinds, was really embraced by it, where the decree was endorsed upon and made special reference to an antecedent scheme of valuation, the Court admitted the light which the scheme threw upon the question; and finding that it did not embrace the forest, they held that that subject had not been valued (*g*). In like manner, the list of debts referred to in a composition-contract is binding on the bankrupt and his cautioner (*h*).[1]

§ 181. On the same principle where a personal bond by a vassal bore that it was in implement of certain articles of roup, and partly narrated them, the Court looked at the articles in a question whether the bond was to be regarded as a perpetual obligation on

(*c*) See, for example, Oswald *v.* Lawrie, 1828, 5 Mur., 9—Fowler *v.* Macartney, 1831, 9 S., 705—Watson *v.* Kidston, 1839, Macf. R., 218. (*d*) Maule *v.* Moncrieff, 1846, 5 Bell's Ap. Ca., 333—N. British Ry. Co. *v.* Tod, 1846, 5 Bell's Ap. Ca., 184, reversing 8 D., 726. (*e*) Aberdeen Ry. Co. *v.* Blaikie, 1851, 13 D., 527—Wilson *v.* Glasgow and S. Western Ry., 1851, 14 D., 1. (*f*) Gordon *v.* Robertsons, 1825, 3 S., 656 (reversed on merits, 2 W. S., 115)—Gordon *v.* Andersons, 1828, 3 W. S., 1. (*g*) Cameron *v.* M'Pherson, 1853, 15 D., 657. (*h*) Atkinson *v.* Walls, 1833, 11 S., 429—Dickson *v.* Barbour, 1828, 6 S., 856. See also Gordon's Trs. *v.* Glen, 1828, 6 S., 393—Smith *v.* Wilson, 1824, 3 S., 393.

[1] As to the effect of a reference in a settlement to a list of legatees, see Sprot *v.* Pennycuick, 1855, 17 D., 840; and Cooper *v.* Mackenzie's Trustees, 1860, 22 D., 880; the questions in both cases arising out of the same deeds.

the vassal, or as one which terminated on his disponing to a *bona fide* purchaser (*i*). Again, where a projected railway company and a proprietor, through whose lands their line ran, entered into an agreement, which stipulated that the company should be allowed to take land beyond what was specified in their statutory notices, and which bound the parties to submit all questions between them to a certain person as referee; and where the parties afterwards executed a deed referring to that person all demands, claims and questions at the instance of the proprietor against the company,—it was held that the deed of submission must be read with and construed by the previous agreement, and consequently that the arbiter had power to authorise the company to take land not included in their statutory notices (*j*). And where a proposed sale of land by a town council had been advertised in terms of an Act of Parliament, and had been carried out under articles of public roup and a subsequent disposition in favour of the purchaser, both of which documents mentioned the subjects as having been thus advertised, it was held competent in a question as to their boundaries to look at the advertisement, which was regarded as an integral part of the contract, and necessary to its validity (*k*). The three last cases shew that the competency of construing one deed with reference to another is not limited to cases where the documents are contemporaneous, but applies wherever there is sufficient ground for holding that they are mutually dependent as parts of one transaction.

§ 182. So strong is the principle of construction thus noticed, that the Court will not receive the main contract without the document to which it refers, where that is "of such a nature as to affect the meaning of the part produced in relation to the matter which it is the object of the writings to prove" (*l*). And an interlocutor in a process cannot be put in, unless it is accompanied by such other proceedings in the case as are necessary for making that which is tendered intelligible (*m*). But, on the other hand, the Court will not look at the subsidiary document except in so far as it is incorporated into the main deed by the reference (*n*); the nature and object of which must therefore be kept in view in considering its effect. For example, where a will merely mentioned by

(*i*) Aberdeen College *v.* Lady Hay, 1852, 14 D., 675—Brown *v.* Webster, ibid.

(*j*) Renton *v.* N. British Ry. Co., 1847, 9 D., 1209. (*k*) Davidson *v.* Mag. of Anstruther, 1845, 7 D., 842. (*l*) Per Lord Fullerton in Thom *v.* N. British Bank, 1850, 13 D., 184—Watson *v.* Kidston, 1889, Macf. R., 218. (*m*) Beveridge *v.* Scott, 1822, 3 Mur., 105, 6. (*n*) N. British Ry. Co. *v.* Tod, 1846, 5 Bell's Ap. Ca., 201, per Lord Cottenham, Ch.

way of narrative that the testator had executed a deed of entail, the heir under the latter deed was held not to be excluded from challenging it, in consequence of his having taken a bequest under the will; whereas, if the two deeds had been read together as one settlement, he would not have been allowed to approbate the one and reprobate the other (*o*).

§ 183. It follows from these principles, that when parties intend their written contract to be construed in connection with any document beyond or "dehors" it, that intention must be either expressed or clearly implied in the main deed. Accordingly where a plan was merely exhibited at entering into the contract, without being executed along with the deed, or imported into it by a reference, the deed must be construed independently of it (*p*). This rule holds *a fortiori*, where a reference to a plan or other document was deleted in adjusting the draft of the deed (*r*). So where A and B jointly signed a promissory note to a certain society for money which A had borrowed, and at the time of the loan a printed but unsubscribed book containing the society's rules was given by the society to B,—it was held that B could not resist payment on the ground of an agreement as contained in the book that he should have notice before proceedings were raised against him, the book mentioning that such was the course adopted by the society in making good their claims (*s*). There is a case, however, in which the magistrates of Edinburgh were interdicted from building in the New Town on certain ground marked as pleasure-ground on a plan which had been exhibited to the feuars, but which was not referred to in their charters. The *ratio decidendi* was, that the magistrates had held out to the public that the city would be built in conformity with the plan, and on that footing had obtained statutes from the legislature and large contributions from the people of Scotland, chiefly with a view to the amenity of the city, to which the pleasure-ground in question very much contributed (*t*). But

(*o*) Urquhart *v.* Urquhart, 1853, 13 D., 742; affirmed, 14th July 1853.

(*p*) Feoffees of Heriot's Hospital *v.* Gibson, 1814, 2 Dow, 301—Gordon *v.* Marjoribanks, 1818, 6 Dow, 87, affirming. (The Court of Session decision will be found in a note to Young & Co. *v.* Dewar, *infra*)—Squire *v.* Campbell, 1836, 1 Mylne and Craig, 459—N. Brit. Ry. Co. *v.* Tod, *supra*, (*n*). See also Stewart *v.* Burke, 9th Dec. 1820, F. C.—*contra*, Young *v.* Dewar, 17th Nov. 1814, F. C., and Schultze *v.* Campbell, 29th Nov. 1815, F. C. (*r*) Campbell *v.* Boswell, 1841, 3 D., 639—Guthrie *v.* Cochrane, 1846, 19 Sc. Jur., 69. (*s*) Brown *v.* Langley, 1842, 4 Man. and Gran., 466.

(*t*) Deas *v.* Town of Edinburgh, 1772, 2 Pat. Ap. Ca., 259, reversing. Perhaps this case may be brought under the principle noticed in § 186, *infra*.

this decision was pronounced in a bill-chamber case, and left the question of right to be settled afterwards. It has been doubted in the highest quarter (*u*). The proprietors of ground having procured a feuing plan, on which various stances and proposed streets were delineated; and certain stances which were thereafter feued having been described in the feu-contract as bounded by certain streets and otherwise, as shown on the feuing plan, which however was not signed with reference to the contract; it was held that the reference was merely for identification, and did not incorporate the plan into the contract (*v*).

§ 184. Whether the case of Deas *v.* Town of Edinburgh was properly decided or not, there is no doubt of the principle, that the main deed will be construed on the footing of the subsidiary document being imported into it, although that is not expressed, if it is clearly deducible from their mutual terms and purposes. Thus where arbiters had made up a detailed state at pronouncing their decree, the Court allowed it to be referred to in a question whether they had exceeded their powers, that being doubtful on the decree alone (*x*). On the same principle, where a party has left several deeds of settlement or codicils unrevoked, they will be read together as one deed, and as mutually explaining each other, whether they were executed on the same day (*y*), or at considerable intervals (*z*).[2] It would even seem that a codicil which has been revoked may be looked at as explaining the testator's intentions under his will (*a*).[3] Thus also, where a party resident abroad executed an absolute dis-

(*u*) Per Lord Chancellor Eldon in Gordon *v.* Marjoribanks, *supra*, and Feoffees of Heriot's Hospital *v.* Gibson, *supra*. (*v*) Johnston *v.* Robertson, 1854, 16 D., 1049.

(*x*) Steele *v.* Steele, 22d June 1809, F. C., Session Papers. See also Bell *v.* Halliday, 1825, 4 S., 286. (*y*) Fergus *v.* Fergus, 1833, 11 S., 362.

(*z*) Watson *v.* Watson, 1841, 3 D., 522—Robertson *v.* Ogilvy's Tr., 1844, 7 D., 236—Grant *v.* Stoddart, 1849, 11 D., 860 (reversed on merits, 1 Macq., 163)—Ogilvy *v.* Cumming, 1852, 14 D., 363—Baron Norton's Tr., 1851, 13 D., 1017 (compared with Bowie *v.* Bowie, 1801, Hume D., 765). See an old case as to three entails and a bond, which the Court treated as one deed; Elies *v.* Inglistoun, 1669, M., 16,999.[2]

(*a*) Adv.-Gen. *v.* Smith, 1852, 14 D., 583. See *contra*, Hughes *v.* Turner, 1835, 3 My. and Kee., 666.

[2] Baird *v.* Jaap, 1856, 18 D., 1246—Provost and Magistrates of Dundee *v.* Morris, 1858, 3 Macqueen, 134; reversing judgment of Court of Session.

[3] Erased words in a testamentary writing may be looked at for the purpose of showing what the testator had at one time intended, and what he knew when he wrote the deed; *per* Lords Cranworth and Wensleydale, in Provost and Magistrates of Dundee *v.* Morris, *supra*.

position, but in the letter in which he transmitted it to the disponee stated that he granted it only in trust and on the faith of a back bond being prepared without delay, and where the disponee received and acted under the deed in the knowledge that the granter had made that intimation, the letter was read along with the deed, as limiting the disponee's right to trust (*b*). And where the bond for a certain sum had been executed the same day as an indenture between the grantee as master and the granter's brother as apprentice, the Court found that the coincidence in date was relevant to presume that the indenture and apprentice-fee therein mentioned were the consideration of the bond, the debtor "astructing the same by the writer and instrumentary witnesses" in the deeds (*c*).

§ 185. If the main deed expressly refers to another writing, the Court will admit parole to identify that writing (*d*).[4] But the proof so adduced will require to be clear and conclusive; otherwise a different document might be imported into the deed from that which the parties intended (*e*). Except where the main writing expressly refers to another document, or where a coincidence among writings is manifested by their mutual purposes, the Court will not allow them to be connected by parole (*f*).[5]

§ 186. Yet in cases of contract or obligation, if separate documents indicate, without clearly proving, that they were meant to be combined, the proof may be supplemented by showing that the parties acted upon them on the footing of their coincidence. For example, where a contract for building a corner house specified the cost of the several parts of the work, and was executed according

(*b*) Robertson *v.* Duff, 140, 2 D., 275, particularly Lord Fullerton's opinion.

(*c*) Gun *v.* Fraser, 1714, M., 12,335. See also Gale *v.* Williamson, 1841, 8 Mee. and Wel., 405. (*d*) Inglis *v.* Harper, 1831, 5 W. S., 785—M'Leod *v.* M'Leod, 1824, 3 Mur., 432—Hodges *v.* Horsfall, 1829, 1 Russ. and My., 116—Clinan *v.* Cooke, 1802, 1 Schoales and Lef., 33. (*e*) Hughes *v.* Gordon, 1819, 1 Bligh, 287—Hodges *v.* Horsfall, *supra*—Clinan *v.* Cooke, *supra*. (*f*) Smart *v.* Prujean, 1801, 6 Vesey, 560—Taylor, 755. See also Mackenzie *v.* Dunlop, 1853, 16 D., 129, 136.

[4] Walker *v.* Caledonian Railway Co., 1858, 20 D., 1102, *per* Lord Justice-Clerk Hope.

[5] A feu was described in a feu-contract as bounded "on the north by a road running across my seven roods of land," and the question arose whether the feuar was entitled to the use of a road passing across the seven roods, from one end to the other, or merely to a road which was made across part of the seven roods. The Court, in determining the question, read the contracts under which the rest of the seven roods was feued; Fimister *v.* Milne, 1860, 22 D., 1100. So in construing the term "fallow-break," occurring in a lease, the Court read previous leases of the same farm; Hunter *v.* Miller, 1862, 24 D., 1011.

to a plan which was shewn to the contractor before the work began, but was not referred to in the deed, the Court held the contractor bound by the plan, as if it had been expressly referred to in the agreement (*g*). And where lands had been advertised to be let for eighteen years, and a lease had been executed, which contemplated several years' duration but omitted the number, and where possession for some years had followed, during which the tenant made considerable outlay, the Court held the term of the lease to be eighteen years (*h*). This view is also supported by the cases of Deas against the Magistrates of Edinburgh (*i*), and Robertson against Duff (*j*), already noticed. The principle of these cases is, that the conduct of the parties is the best expositor of their contracts; and a party lies under a personal exception against repudiating the explanation which he has put on his own deeds.[6]

§ 187. The foregoing paragraphs tend to illustrate *e converso* the rule noticed at the outset of this chapter,—that a writing in which a person has recorded his final intentions may not be explained by extrinsic evidence. This rule forms a branch of a much wider subject—the principles of construction of deeds; which will require to be noticed here in order to make the rule in question intelligible.

§ 188. *First*—The primary rule of construction is, that the words of every deed are to be understood in their plain, ordinary, and proper acceptation (*k*). Under this rule a deed is not construed by strictly etymological, any more than by a vulgar and inaccurate, interpretation; but according to the meaning which persons of ordinary intelligence naturally attribute to its language (*l*).

§ 189. *Secondly*—If it is clear from some parts of a deed that the granter has used certain words in a peculiar or inaccurate sense, that will be held to be their meaning in other parts of the deed

(*g*) Scott *v.* Hatton, 1827, 6 S., 233. (*h*) Russell *v.* Freen, 1835, 13 S., 752.

(*i*) *Supra*, § 183. (*j*) *Supra*, § 184. (*k*) This rule, which requires no authority in its support, is stated in 1 Bell's Com., 432—Bell's Pr., § 524—Wigram on Wills, 15 (proposition i)—2 Jarman, 743 (proposition xvi)—2 Phil., 257—1 Greenl., 355—Thellusson *v.* Woodford, 1799, 4 Vesey, 329, per Alvanley, Master of the Rolls—See Doe d. Winter *v.* Perratt, 1826, 5 Barn. and Cress., 77, per Justice Holroyd—Robertson *v.* French, 1803, 4 East., 135, per Ellenborough, Chief-Justice.

(*l*) 1 Bell's Com., 432—See also Lawson *v.* N. British Ry. Co., 1850, 12 D., 1250—The text does not embrace the peculiar rules for construing entails.

[6] Wright *v.* Earl of Hopetoun, 1858, 20 D., 955.

where they occur in the same connection, or appear to be used in the same signification (*m*).

§ 190. On this ground the terms "heirs" and "heirs male" have been construed to mean the special class of heirs mentioned in the context of the deed (*n*). The same principle is illustrated by the cases of Westlake *v.* Westlake, and Castleton *v.* Turner, noticed afterwards (*o*). It applies where the peculiar meaning is manifest from one or more of a series of deeds which embody a single transaction (*p*); while, on the other hand, any peculiar sense which a party has attributed to words in a separate and independent deed, will not be regarded (*q*). The same principle is illustrated by a class of cases noticed afterwards (*r*), in which the word "heirs" occurring in later deeds taken by a certain party is construed to mean the heirs of provision pointed out by his previous settlement; because it is presumed that he meant to favour the class of heirs for whom he had already shown his preference.

§ 191. *Thirdly*—The meaning of a deed having thus to be discovered from its own words, extrinsic evidence cannot—except in some cases of ambiguity (*s*)—be admitted for the purpose of explaining it, or of shewing the intention of the parties under it (*t*).

§ 192. Accordingly, it is incompetent to prove by parole that by "acre" the contracting parties meant Scotch, and not Imperial, acre (*u*);[7] and when the proper legal construction of the term

(*m*) Wigram, 15 (proposition i)—2 Jarman on Wills, 744 (proposition xviii)—2 Phil., 275—1 Greenl., 355—Royle *v.* Hamilton, 1799, 4 Vesey, 437, compared with Winterton *v.* Crawford, 1830, 1 Rus. and Mylne, 407. (*n*) Roxburghe case, 1807, M. "Tailzie," No. 13; affd. on appeal, 5 Wils. and Sh., Appx.—Moodie *v.* Anderson, 1829, 7 S., 743—Hunter *v.* Nisbet, 1839, 2 D., 16. (*o*) § 193.

(*p*) Colegrave *v.* Manby, 1826, 2 Russ. R., 252—Wigram, 16, note—See Keiller *v.* Thomson's Tr., 1824, 3 S., 396, *infra*, § 208, and see *supra*, § 180, *et seq.*

(*q*) Doe d. Brown *v.* Brown, 1809, 11 East., 441. (*r*) § 219.

(*s*) § 213, *et seq.*—§ 221. (*t*) Wigram, 17 (proposition ii)—1 Greenl., 354—2 Phil., 282. Accordingly, the Lord Chief Commissioner rejected the evidence of the Lord President tendered in explanation of the written rules of a jail, although they had been prepared under his approval; Macfarlane *v.* Young, 1824, 3 Mur., 409.

(*u*) Thomson *v.* Garioch, 1841, 3 D., 625.

[7] It was held that the meaning of the term "acre" was fixed by the Acts, 5 Geo. IV, c. 74, and 5 and 6 Will. IV, c. 63 (the latter prohibiting the use of local weights and measures), to mean imperial acre. But where goods were sold at a price "per stone, and each stone to consist of 22 pounds," whereas the Act 5 and 6 Will. IV, c. 63, § 11, provides that the weight denominated a stone shall consist of 14 standard pounds avoirdupois; it was held that the bargain was not null under the Act, but that the sale

"heirs" has been ascertained, with reference to the nature of the subject conveyed and the destination in any previous deeds by the same party, his intention to favour a particular class of heirs cannot be proved by parole (*v*), or by a holograph note of directions from which his agent prepared the deed (*w*). So where articles of roup in a judicial sale were clearly expressed, effect was given to their proper construction, and the evidence of the common agent who had prepared them, and a correspondence between him and the judicial factor, were held inadmissible for the purpose of giving them a different meaning (*x*). It is therefore incompetent for one of the parties to a contract to prove by extrinsic evidence what he intended by the words in the deed (*y*). Nor can one of the contracting parties examine the other as a witness, upon his understanding of the words of the contract, when it is founded on by a person in right of that other party (*z*).

§ 193. On the same principle, where a party devised to "Matthew Westlake my brother, and to Simon Westlake my brother's son," it was held in England that Simon the son of Matthew was intended; and proof that the testator had declared his intention to favour Simon, the son of another brother, was held inadmissible (*a*). And where the testator left provisions to his wife and niece (who were the only females named in the will), and the latter part of the deed contained a certain devise to "her," Lord Hardwick, finding that in other places throughout the will the testator had applied "her" to his wife, held that the word had that meaning in the place in question, and therefore refused to admit parole to prove whether the wife or niece had been intended (*b*).

(*v*) E. Selkirk *v.* Douglas, 1762, M., 4369 (5th point) and M., 12,350; affd. 1779, 2 Pat. Ap. Ca., 449—Shaw *v.* Forbes, 1687, M., 4235—*contra* Weir *v.* Steile, 1745, M., 11,359; which was compromised before final decision; see Elch. "Presumption," No. 17—See § 219. (*w*) Blair *v.* Blair, 1849, 12 D., 97. See also Goodinge *v.* Goodinge, 1749, 1 Ves. Sen., 230—Murray *v.* Jones, 1818, 2 Ves. and Bea., 318—*contra*, Pollock *v.* Gilmour, 1777, M., 8098, and M., Appx. "Legacy," No. 1, *infra*, § 211. See § 219. (*x*) Stevenson *v.* Moncrieff, 1845, 7 D., 418. See also Mackenzie *v.* Dunlop, 1853, 16 D., 129. (*y*) Pollock *v.* Turnbull, 1827, 5 S., 195—Threshie *v.* Hyslop, 1833, 12 S., 105—Florence *v.* Florence, 1832, 10 S., 326. (*z*) Dunlop *v.* Lambert, 1837, 15 S., 884, 1232 (reversed on merits, M'L. and Rob., 663)—Vertue *v.* Ward, 1843, 5 D., 1251. (*a*) Doe d. Westlake *v.* Westlake, 1820, 4 B. and Ald., 57. (*b*) Castleton *v.* Turner, 1745, cited 2 Ves. Sen., 216.

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was at so much for each 22 pounds; Robertson *v.* Gow, 1858, 20 D., 1170—Giles *v.* Jones, 1855, 24 L. J. Exch., 259. Parole evidence is not admissible to explain a word defined by statute; Smith's Leading Cases, 5th edition, i, 534.

It follows from the rule thus noticed, that when a written contract does not contain technical words, the Court will construe it, and will limit the inquiry before the jury to the question whether it has been implemented (*c*).[8]

§ 194. *Fourthly*—When a deed contains words unknown in ordinary phraseology, these must be explained by extrinsic evidence, on the same principle by which a deed written in a foreign language must be translated by interpreters. When the technical expressions in the deed have been explained, it is construed as if the words of interpretation were substituted for those in which the deed is expressed (*d*).

§ 195. On this principle the word "soum" (pasture for a certain number of sheep or cattle) may be explained by proving its customary meaning in the district to which the deed applies (*e*). When a contract to execute work is expressed in terms short and unintelligible, parole of their meaning is admissible (*f*). So parole evidence was received to prove that a "cutting shop" included an engine-house and stalk (*g*). On the same principle, where one has been in the habit of designating certain persons or things by peculiar terms or nicknames, the meaning of these words when occurring in his writings may be explained by extrinsic proof,—as in a case where a legacy had been left to "Mrs G.," and parole was admitted to shew that the testator had been in the habit of calling a Mrs Gregg by that abbreviation (*h*). So the words "bankers" and "mods.," occurring in the will of a sculptor, were explained by evidence of persons in the same profession (*i*). On this principle, also, in construing an old deed, the Court will look at other deeds of the period in order to explicate its phraseology (*k*).

(*c*) Haldane *v.* Gray, 1842, 4 D., 1307—Maxton *v.* Brown, 1839, 1 D., 367—Jaffray *v.* Simpson, 1835, 13 S., 1122—Wilson *v.* Glasgow and S. West. Ry. Coy., 1851, 14 D., 1—See also Calder *v.* Aitchison, 1831, 9 S., 777; affd., 5 W. S., 410.

(*d*) 1 Bell's Com., 433—Wigram, 48 (proposition iv)—2 Phil., 277.

(*e*) M'Kenzie *v.* M'Rae, 1825, 4 S., 146. See a similar case as to the meaning of "out-town multure" in a lease; Cochrane *v.* Wallace, 1820, 2 Mur., 297.

(*f*) Sweet *v.* Lee, 1841, 3 Man. and Grang., 452. (*g*) Watson *v.* Kidston, 1838, Macf. R., 213; 1 D., 1254. (*h*) Abbot *v.* Massie, 1796, 3 Ves., 148, explained by Baron Rolfe in Clayton *v.* Lord Nugent, 13 Mee. and Wel., 204, 207—See also Blundell *v.* Gladstone, 1841, 11 Sim., 467—Taylor, 784. (*i*) Goblet *v.* Beechy, 1829, 3 Sim, 24, as noticed in Wigram, 179, 185. But see Doe d. Oxenden *v.* Chichister, 1816, 4 Dow, 65, *infra*, § 206 (*u*). (*k*) Roxburgh case, 1810, per L. Ch. Eldon, 5 W. and S., Apx.—per L. Moncrieff in Blair *v.* Blair, 1849, 12 D., 110—See also Cochrane *v.* Wallace, 1820, 2 Mur., 296.

[8] Where parole evidence is given of the contents of a lost document, its construction is for the Court not for the jury; Berwick *v.* Horsfall, 1858, 4 Scott's C. B. N. S., 450.

§ 196. *Fifthly*—A large proportion of the technicalities of trade, science, and the like, have been engrafted on words which have a kindred meaning in ordinary language. It follows from the rule last noticed that extrinsic evidence is admissible to show the peculiar meaning of words so used; for law presumes that the words of every deed have been employed with reference to its subject matter (*l*).[9]

§ 197. Thus parole was admitted to prove that in the contracts of a particular trade a "thousand" rabbits meant twelve hundred (*m*); that a contract for three years' service in a theatre at a certain rate "per week" only referred to the weeks during the theatrical season (*n*); that "cotton in bales" meant in compressed bales (*o*); that "good" barley was different from "fine" barley, so that an offer by letter to sell the one was not accepted by an answer agreeing to buy the other (*p*). So it may be shewn that a contract for a number of pockets of hops "at 100" means at that price per ton (*r*).[10] On the same principle, where a dissenting con-

(*l*) 1 Bell's Com., 438. (*m*) Smith *v.* Wilson, 1832, 3 B. and Ad., 728. (*n*) Grant *v.* Maddox, 1846, 15 Mee. and Wel. 737. (*o*) Taylor *v.* Briggs, 1827, 2 Car. and Pa., 525. (*p*) Hutchison *v.* Bowker, 1839, 5 Mee. and Wel., 535. (*r*) Spicer *v.* Cooper, 1841, 1 Gal. and Dav., 52.

[9] In construing the term fallow-break in a lease the Court read previous leases of the lands and a report by a skilled agriculturist, but refused a proof of the tenant's averment that the term was technical, and that its meaning was different from that put on it by the reporter, and ultimately adopted by the Court; Hunter *v.* Miller, 1862, 24 D., 1011.

[10] Thus parole proof was admitted to prove that pig iron, No. 1, meant Clyde and Dudyvan iron; Mackenzie *v.* Dunlop, 1856, 3 Macqueen, 22;—that an obligation to load on board a vessel at Trinidad a full and complete cargo of sugar molasses, imported an obligation to load a cargo packed in a manner customary at Trinidad, though there was no custom of the kind at London, where the contract was entered into; Cuthbert *v.* Cumming, 1855, 11 Hurl. and Gord., 405;—that a bale of gambier meant, in the Gambier trade, a bale of a particular size and description; Gorrissen *v.* Perrin, 1857, 2 Scott's C. B. N. S., 681;—that in the oil-trade oil is held to be "wet" if it contain any water at all, however little; Warde *v.* Stewart, 1 Scott's C. B. N. S., 88;—that a contract for best palm oil was satisfied if the oil delivered contained a substantial portion (as one-fifth) of best oil; Lucas *v.* Bristow, 1858, Ellis and Ellis, 907.

Where the terms of the particular contract have, besides their ordinary and popular, a scientific and peculiar meaning, the parties who have drawn up the contract, with reference to that particular department of trade or business, must fairly be taken to have intended that the words should be used, not in their ordinary, but in their peculiar sense. This is only acting upon the sound principle that contracts are to be interpreted and carried out according to the intention of the parties; and it is only giving effect to that principle when one gives to the words their peculiar as distinguished

gregation signed a "call" or invitation to a certain clergyman, which bore, "on your accepting of this call we promise you all dutiful respect, &c., together with a suitable maintainance;" and where the minister having accepted the call sued the subscribers for a certain salary, they were allowed to prove, *prout de jure*, that according to the law and practice of their church and the mutual understanding of the parties, the words referred to were not intended to constitute a civil obligation (*s*). And where a testator left certain bequests to "godly persons" and "godly preachers of Christ's holy gospel," it was held in a leading English case to be competent to prove that in the religious body to which the testator adhered these terms were used to designate a certain description of persons and preachers (*t*).

§ 198. In order to entitle a party to prove that words which are in common use have a peculiar meaning by usage of trade or the like in a certain contract, he must aver that fact on record (*u*); and the proof must be sufficiently clear and strong to overcome the presumption that the words are used in their ordinary acceptation (*x*).

§ 199. The proof referred to is only competent in order to explain the technical language of the writing in question, not to show what is its proper construction and effect. Accordingly, where a party bound himself "to guarantee an agent for four per cent. for commission and guarantee," the Court construed the writing to mean a guarantee for payment of the price for which goods sent to the agent should be sold, and held that the evidence of mercantile men was inadmissible to prove that in practice the words compre-

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(*s*) Arneil *v.* Robertson, 1841, 3 D., 1150.—See also Hyslop *v.* Nairne, 1825, 4 S., 84.

(*t*) Shore *v.* Wilsons (Lady Hewley's trust), 1842, 9 Clark and Fin., 355. See also Att.-Gen. *v.* Drummond, 1841, 1 Dru. and War., 353. (*u*) Milne *v.* Samson, 1843, 6 D., 355—Guthrie *v.* Cochrane, 1846, 19 Sc. Jur., 69. See also Mackenzie *v.* Dunlop, Wilson, & Co., 1853, 16 D., 129. (*x*) 1 Bell's Com., 433—Guthrie *v.* Cochrane, *supra*.

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from their popular acceptation. This can only be carried out by means of parole evidence; Myers *v.* Sarl, 1861, 30 L. J., Q. B., 8, *per* Cockburn, C. J., p. 12.

A mercantile usage can be proved only by a multiplication of particular usages, and therefore it is competent, with a view to establish mercantile usage, to prove what a person dealing in the kind of trade in question understood to be meant by the technical term; Mackenzie *v.* Dunlop, *supra*. In that case the Lord Justice-Clerk observed, "There can be no doubt that we have never in Scotland gone so far as they have done in England, in admitting evidence of understanding or usage in order to construe thereby a written document;" Mackenzie *v.* Dunlop, 1853, 16 D., 129, 139. But the judgment pronounced in that case was reversed on appeal.

hended an additional guarantee for the agent's faithful conduct (*y*). In this case, Lord Chancellor Brougham observed that the bar "must be well aware that in mercantile cases—not in other cases—the learned judges have regretted they have gone so far as putting a letter into the hands of a witness, and saying what does it mean" (*z*).[11]

§ 200. Under the *fourth* and *fifth* rules thus noticed, the extrinsic evidence is admitted in order to ascertain what the granter of the deed meant by the words which he used; and not to attribute to these words any unexpressed meaning which he might be supposed to have contemplated. This principle was involved in the case of Lady Hewley's trust (*a*) already noticed; where the majority of the judges seem to have considered that the extrinsic evidence was admissible to show the meaning which was attributed to the words in question by the religious body to which the donor adhered; but that general evidence of the opinions of the donor could not be received in order to show in what sense she meant the words to be understood (*b*). Baron Parke observed in this case, "when the appropriate meaning of the words occurring in the deed has been ascertained by competent evidence, then the deed is to be read as if the equivalent expressions were substituted; and no further evi-

(*y*) Calder *v.* Aitchison, 1831, 9 S., 777; affd. 5 W. S., 410. See *supra*, § 193, (*c*).

(*z*) See also Milne *v.* Samson, *supra*, (*u*); and compare Arneil *v.* Robertson, Hislop *v.* Nairn, *supra*, § 197, and Schuurmans *v.* Stephen, 1832, 10 S., 839, 11 S., 779. On this subject generally, see chapter iii. of this title, *infra*, § 230, *et seq.*

(*a*) *Supra*, § 197. (*b*) Mr Greenleaf (vol. i, p. 386, note) observes that "the precise question, whether the religious opinions of the founder of a charity can be received as legal exponents of his intention or belief, can hardly be considered as definitively settled" by this case.

[11] This has been held incompetent; Kirkland *v.* Nisbet, 1859, 3 Macqueen, 766.

The rule appears to be, that proof of mercantile practice will be admitted to explain but never to contradict a contract; Muncey *v.* Dennis, 1856, 1 H. and N., 216—Dale *v.* Humfrey, 1858, Ellis and Ellis, 1004. Thus, where a party who chartered to China a vessel, which was consigned to his agent there, pleaded that, in respect of a custom to that effect in China, the agent in China was entitled to procure charters for the homeward voyage, proof was rejected of the custom, as not within the contract; Phillipps, 1 Hurl. and Norm., 21. On the other hand, where a broker's note showed that he was not principal in the transaction, but did not disclose the principal, the other party to the transaction was allowed to support an action against him as principal, by proof of a rule in the business, that, where the principal was not disclosed, the broker should be liable as principal; Dale *v.* Humfrey, 1858, *supra*.

A custom must be reasonable and not unrighteous or unfair; Paxton *v.* Courtnay, 1860, 2 Fost. and F., *nisi prius*, 131—Bottomley *v.* Forbes, 5 Bingham N. C., 121.

dence of the peculiar sect or religious opinions, or any other circumstance attending the parties to the deed, is admissible to explain or control their meaning." "It matters not that the opinions of the testator would make such a disposition (as that which the words indicate) unlikely; in such a case *quod voluit non dixit.*" In another of the English decisions (*c*) noticed above, the Court would not admit evidence, that when the will was read over the testator stated that by the word "mod^s." he meant his models. Again, in an action between the parties to a written contract of sale of a certain quantity of "ware potatoes," where the purchaser tendered evidence to prove not only the meaning of the term, but that the contract had been made for a particular kind of wares, Lord Denman's ruling that the latter part of the evidence was admissible, and that the jury might give effect to the agreement on that footing, was held to be erroneous, upon the ground that such proof went to vary and limit the written contract (*d*).

§ 201. It is not easy to reconcile with these authorities a case (*e*) in which the word "privilege" occurring in a contract between the master and owners of a vessel was allowed to be explained, not merely by showing the general meaning of the word in the language of trade, but also by proving that the parties had expressly attributed a certain meaning to it when they entered into the contract. Lord Chief-Justice Gibbs observed, "the conversation is admissible evidence of mercantile understanding, if not farther. And if the term had been used in different ways, the conversation is evidence to show in which sense it was used on the present occasion." So in an American case (founded on by Mr Greenleaf), where two booksellers had contracted for the sale of a certain work at "cost," parole of conversations between them at the time of making the agreement was received, in order to show what meaning they attached to the term (*f*). Mr Taylor justly observes that little weight should be attached to these decisions (*g*).

§ 202. *Sixthly*—Extrinsic proof is admissible in every case to show the circumstances which surrounded the granter of the deed when he subscribed it, as well as those which were antecedent or coincident to its execution (*h*). The object of such a proof is to

(*c*) Goblet *v.* Beechy, 1829, 3 Sim., 24, *supra*, § 195, (*i*). (*d*) Smith *v.* Jeffryes, 1846, 15 Me. and Wel., 561. (*e*) Birch *v.* Depoyster, 1816, 1 Starkie R., 210. (*f*) Gray *v.* Harper, 1 Story's Rep., 574—1 Greenl., 358, 385—See also Selden *v.* Williams, 9 Watts (American), 9—Sweet *v.* Lee, 1841, 3 M. and Gr., 452, 460. (*g*) Taylor, 774. (*h*) Wigram, 51 (propos. v)—2 Philips, 294, 5—1 Jarman, 363.

enable the judge to examine the deed as nearly as possible from the point of view from which the granter saw it; for the nearer he can approach to that point, the more likely is he to construe the deed as the granter would have done. This evidence, therefore, is not admitted for the purpose of attributing to the deed a meaning which its words do not convey, but of learning the appropriate meaning of its words when used by a person in a certain situation. Accordingly, when the deed has been elucidated by proof of the surrounding and antecedent circumstances, it must be construed on the footing that its words have the meaning which they bear when so regarded; and, except in certain cases of ambiguity (*i*), there can be no inquiry into the unexpressed intention of the granter, the bias of feeling in his mind, or the probabilities as to his making the provisions which the deed is found to contain.

§ 203. This principle admits evidence of the knowledge of the granter regarding the subject of the deed.[12] Thus, in an English case, where a testator devised to his niece and her three daughters, Mary, *Elizabeth*, and Ann; and at the date of the will the niece had three daughters so named, but *Elizabeth* was illegitimate, the other two being legitimate, it was held competent to prove that the niece had had a legitimate daughter Elizabeth, who died some years before the date of the will, and that neither her death nor the birth of the illegitimate daughter had been known to the testator (*j*). So if one left a bequest to a person named, and it appeared that there were two persons of the name, proof that the testator was only acquainted with one of them would be admitted (*k*). Again, suppose a person resident in India bequeathed a gold watch, and he had one in India in constant use, and another which he had left in London twenty years before, proof of these circumstances would free the bequest from the ambiguity raised by the fact that the testator had two watches (*l*). In the same manner, proof of the amount of interest which the granter of a deed had may be admitted to clear up his bequest, *e.g.*, "If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to shew what interest I had in the pre-

(*i*) See § 213, *et seq.* (*j*) Doe d. Thomas *v.* Beynon, 1840, 4 Per. and Dav., 193; 12 Ad. and Ell., 431, S. C. (*k*) See Wigram, 58. (*l*) Wigram, 59, 65.

[12] A testator bequeathed his lands in a certain parish. He had lands in the parish, and also other lands not in the parish, but which, at the date of the bequest, were reputed to be so; it was held that these latter lands passed; Anstee *v.* Nelms, 1856, 1 H. and N., 225.

mises? For if I was tenant in the fee, he will take the estate for his own life, but if tenant in tail or for life only, he will take for mine" (*m*).

§ 204. Under this rule, also, communings between the parties antecedently to the contract are admissible, not in order to modify the words of the deed by a specific proof of any previous arrangement, but in order to shew the position from which the parties viewed the deed. For example, in a question regarding the rights of a widow under her marriage-contract, a relative correspondence which passed between her husband and her father before the marriage was held admissible for the latter purpose, but not for the former (*n*). The Lord Chancellor Cottenham observed, "There were produced, and commented upon at your Lordship's bar, several letters which passed before the execution of the contract. There was also produced and commented upon, the will of the husband made at a time considerably subsequent to the date of the contract. I apprehend, according to the strict rules of evidence, those documents ought to be entirely rejected; rejected so far as they might be supposed to be produced for the purpose of putting any construction upon the instrument itself. The marriage-contract must speak for itself; the rights of the parties must be ascertained from the language of that marriage-contract, and not from anything which may have passed before, and still less from anything which may have passed afterwards. At the same time it is certainly within the rules of evidence, and therefore may legitimately be looked into to see what were the circumstances existing at the time the marriage-contract took place. The marriage-contract speaks of a certain pension. Now, what that pension was, and what knowledge the parties had of that pension, are subjects as to which these documents may be looked at for the purpose of explaining the intention in the marriage-contract itself; every Court of justice having a right to have all the information which was in the possession of the parties contracting, to place itself in the situation of the parties, for the purpose of putting a construction upon the instrument to which they have become parties." On the same principle, in an action of damages by a tenant for not being put in possession of the whole subject claimed under missives of

(*m*) Per Justice Bayley in Smith *v.* L. Jersey, 1821, 2 Brod. and Bing., 551.

(*n*) Forlong *v.* Taylor's Exrs., 1838, 3 Sh. and M'L., 177, 210—See also per Lord Jeffrey in Davidson *v.* Mag. of Anstruther, 1845, 7 D., 351. See the rule on this head stated by L. Ch. Sugden, in Att.-Gen. *v.* Drummond, 1842, 1 Dru. and War., 367.

lease, the communings which passed between the parties before they executed the missives were allowed to be proved, as the *res gestae* out of which the contract arose (*o*). And where parties agreed by a bill of lading for a sale of certain stores, proof of a previous verbal agreement between them was admitted, in order to shew the circumstances from which the written contract originated (*p*). So proof of the *res gestae* at granting a bill of exchange was admitted in a question whether it was meant to be in full of a disputed claim, or only in payment of interest (*q*).[13]

§ 205. *Seventhly*—In questions as to the subject of a deed, or the person favoured by it, extrinsic evidence is admissible for the purpose of identification, provided the description be sufficient to point out some individual person or thing (*r*). In such cases it may appear, (1) That the description is appropriate and complete as to one object, and not appropriate to any other object; or (2), That the description is wholly inappropriate to the person or thing which it is supposed to designate; or (3) That it is partly a right and partly a wrong description; or (4) That it describes not only one, but any one of several objects.

§ 206. (1) There can obviously be no difficulty when the de-

(*o*) M'Leod *v.* M'Leod, 1824, 3 Mur., 433. In Drummond *v.* Ross, 1824, 3 S., 315, in a question whether a deed bearing to be a discharge of an adjudication was not merely a suspension of its operation, the Court looked at correspondence between the parties both before and after the deed, because without it the agreement was unintelligible. (*p*) Reid & Co. *v.* Sinclair, 1827, 4 Mur., 379. See also Stothart *v.* Johnstone's Tr., 1821, 2 Mur., 544, 5. (*q*) Flockhart *v.* Lawson, 1831, 9 S., 873, 10 S., 472, S. C. See also Wilson *v.* Glasgow and S. Western Ry. Co., 1851, 14 D., 1.

(*r*) Lord Walpole *v.* Lord Cholmondeley, 1797, 7 Durf. and E., 138—2 Evans' Pothier, 210.

[13] In an action founded on failure to fulfil a contract for horse haulage, the pursuer proposed an issue,—whether the defender agreed to perform the horse haulage work specified in a schedule annexed. There was a written contract, but it made no mention of the number of horses to be employed. The number was, however, stated in the schedule; and the pursuer averred that a list in terms of the schedule had been made out prior to the contract, and that the contract had been entered into with reference to it. He proposed to prove previous communings of the parties, and urged that his object was not to put a meaning on the contract, but to shew the circumstances when the contract was made. But the Court, holding it incompetent to connect the list with the contract by parole, and incompetent to prove previous communings, disallowed the issue. "The principle is well established, that when communings are followed by a written contract, it is not competent to allow any part of the communing, or even of letters that may have passed between the parties, to be held as part of the written contract, or to refer to them so as to enlarge or control the terms of the written contract; Walker *v.* Caledonian Railway Co., 1858, 20 D., 1102, per L. J.-C. Hope, 1105.

scription of the deed is accurate and unambiguous. If it correctly defines one subject, extrinsic evidence will not be admitted to extend or vary its application (*s*). For example, in an English case where a person devised all his freehold estates in the county of Limerick and in the city of Limerick, and he had no real estate in Limerick county, and only a small estate in the city, evidence that he intended to devise his real estates in Clare county was rejected (*t*); and where a party devised his "estate of Ashton," evidence was held inadmissible to shew that he used to designate by that term not only his estate known by that name, but also his lands in certain adjoining parishes (*u*). On the other hand, if a large estate has for some time borne a name which originally defined only a part of it, there arises an ambiguity as to whether the whole or the part was intended, and extrinsic evidence on the point will be admitted (*x*).[14]

§ 207. (2) Where the description is inapplicable, the obligation or bequest will be held void for uncertainty (*y*).

§ 208. (3) Where the description is partly applicable, and partly inapplicable, to the person or thing said to have been intended, the rule is, that if the accurate description is sufficient for the purpose of identification, the erroneous addition would be disregarded; because *falsa demonstratio non nocet, si de corpore constat* (*z*); and extrinsic evidence will be admitted to clear up any doubt on the point. This principle is seen in a case where a legacy left by a trust-deed to "Janet Keiller or Williamson, confectioner in Dundee," was claimed by Agnes Keiller, widow of Wedderspoon, who had been a confectioner in Dundee. As she had a sister, Janet

(*s*) Wigram, 51 (proposition v). (*t*) Miller *v.* Travers, 1832, 8 Bing., 244.

(*u*) Doe d. Oxenden *v.* Chichister, 1816, 4 Dow, 65. In a previous case the English judges were divided on a similar point; Whitehead *v.* May, 1801, 2 Bos. and Pull., 598.

(*x*) Doe d. Beach *v.* E. Jersey, 1818, 1 B. and Ald., 550; 3 B. and Cress., 870. See also per L. Justice-Clerk Hope in Forbes *v.* Kirk, 1842, 4 D., 1177.

(*y*) See § 211, 212. (*z*) See Maclaine *v.* Maclaine, 1852, 14 D., 870—L. Advocate *v.* L. Forbes, 1750, 1 Cr. and St., 482, reversing—Guthrie *v.* Monro, 1833, 11 S., 465.

[14] A grant conveyed certain lands in lease, extending to about 200 acres, "and the village of Scartnaglowrane," and part of Whitechurch and Tincurry, containing by estimation 148 acres. Parole evidence of use, &c., was admitted to shew that 1700 acres of mountain land had always been enjoyed as part of the "village of Scartnaglowrane," and was comprised in the term village, and passed by the grant, "village" being held to be in law a term capable of such a construction; Waterpark *v.* Fennel, 1859, 7 Clark, House of Lords, 650.

Keiller, married to a seaman named Whitton, and residing in Broughty Ferry near Dundee, the trustees raised a multiplepoinding for determining who had right to the legacy. Janet Keiller did not compete; and Agnes Keiller or Wedderspoon founded her claim on the circumstance that in five previous wills with eight codicils (which were all holograph) found in the truster's repositories she was named "Keiller," and designed " confectioner in Dundee;" being described in one as "Janet Keiller, confectioner in Dundee;" in another as "Keiller, spouse to Wedderspoon, confectioner in Dundee;" while, in a third codicil, a legacy was left to "Helen Smith, whom Mrs Wedderspoon takes the charge of," and it was proved that the claimant had been in the habit of corresponding with the truster and receiving money from him for behoof of Helen Smith. The claimant being thus identified as the person pointed at by all these wills and codicils, she maintained that the clerk who transcribed the trust-deed had erroneously transcribed "Williamson" instead of "Wedderspoon" from the holograph wills; and the Court adopted that view, being "clearly of opinion that no other person could be meant except the claimant" (*a*). In a subsequent case arising out of the same succession, a legacy to "William Keiller, confectioner in Dundee," was claimed by William Keiller, confectioner in Montrose, and by James Keiller, confectioner in Dundee; but William having retired from the competition, the Court preferred James, being satisfied that he was the party whom the testator meant to favour. It appeared that James was a relation of the truster, and had been on habits of intimacy with him; that he was the only confectioner of the name of Keiller in Dundee; and that William Keiller had never been a confectioner there, and had not been a confectioner at all till within a few months before the truster's death (*b*). It may be questioned whether the descriptions in these cases were not so erroneous, that the Court in effect made the bequest which the truster had intended, but not expressed (*c*).

§ 209. Again, where a testator in England devised to his wife stock in the 4 per cent. annuities of the Bank of England, and it was shewn that at the date of the will he had no such stock, but

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(*a*) Keiller *v.* Thomson's Tr., 1824, 3 S., 396. (*b*) Keiller *v.* Thomson's Tr., 1826, 4 S., 724. (*c*) In Andrews *v.* Dobson, 1788, 1 Cox, 425, where a legacy had been left to James, the son of Thomas Andrews in Eastcheap, printer, and there was no Thomas Andrews in the place, but a James Andrews, printer, who had by his first wife a son Thomas related to the testator, and by his second wife a son James not so related, the Court would not admit evidence to shew that the testator had intended Thomas the son of James, instead of James the son of Thomas.

that he had formerly possessed some stock of that kind, which he had sold and invested in 3 per cent. long annuities, the Court held that the bequest was substantially one of stock, which was not defeated by the misdescription, and therefore they found that the long annuities were carried by it (*d*). In another English case, where the subject of an agreement was lands "in the occupation of widow Kellet and her son," and no lands were occupied by her at the date of the will, the precise meaning of the words was controlled by extrinsic evidence, showing that there were lands which had been possessed by her before her death two years previously; and these lands were held to be carried by the will (*e*). And where a lease described the subject as "all that part of Blenheim park, situate in the county of Oxford, now in the possession of S.," within certain boundaries, "with all the houses thereto belonging, which are in the occupation of S.," it was held that a house lying within the bounds, but not in the occupation of S., would pass (*f*). And where one devised "Trogue's farm, now in the occupation of C.," it was held that the whole farm passed, although it was not all in C.'s occupation (*g*).

§ 210. It will be observed that none of these English cases raised an ambiguity in the proper sense of the term. They were mere questions of identification, in which extrinsic proof was required, in order to discover whether the description in the deed could, notwithstanding its erroneous qualities, be applied to the person or subject in issue. If the descriptions in these cases had been applicable alike to several persons, evidence of the granter's intention would have been admitted, as in questions of latent ambiguity (*h*).

§ 211. *Eightly*—When the words of a deed, illustrated by evidence of the surrounding circumstances and of the meaning of any technical words occurring in it, are insufficient to determine the granter's meaning, extrinsic evidence will not be admitted to prove what he intended, and the deed will be void for uncertainty,—*perinde est ac si scriptum non esset* (*i*). This rule follows from the principle that the duty of the Court is to expound what the deed

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(*d*) Selwood *v.* Mildmay, 1796, 3 Vesey, 306. (*e*) Beaumont *v.* Field, 1818, 2 Chitty's R., 275. (*f*) Doe d. Smith *v.* Galloway, 1833, 5 B. and Ad., 43.

(*g*) Goodtitle *v.* Southern, 1813, 1 Ma. and Sel., 299. (*h*) See § 215.

(*i*) 1 Bell's Com., 434—Bell's Pr., § 524—Wigram, 83 (proposition vi)—1 Jarman, 349—Jones *v.* Henry, 1815, 4 Dow, 145—per L. Abinger in Doe *v.* Hiscocks, 1839, 5 Me. and Wel., 369—per Parke in Doe d. Gord *v.* Needs, 1836, 2 Me. and Wel., 139—Richardson *v.* Watson, 1833, 4 B. and Ad., 787.

declares, and not to import into it the unexpressed intentions of the parties (*k*).[15]

§ 212. Accordingly, parole evidence is inadmissible for the purpose of filling in a name left blank (*l*), or reconciling conflicting clauses in a will (*m*), or of ascertaining who was meant by a devise which on the face of the will is indeterminate, *e.g.*, "to one of the sons of A," who has several sons (*n*).

§ 213. *Ninthly*—Notwithstanding the rules stated under the *third* and *eighth* propositions, extrinsic evidence of the granter's intention is admissible in some cases in order to clear up an ambiguous description in a deed. This exceptional rule does not come into operation unless the ambiguity remains after the deed has been illustrated by proof of the circumstances which surround the granter (*o*), and of the meaning of any technical words which the deed contains (*p*). It seems only to apply where the object of the proof is to discover who or what the granter of the deed meant by a description which applies to more than one person or thing.

§ 214. On this point it is necessary to observe a distinction which has been borrowed from the law of England between *patent* ambiguities, or those appearing on the face of the deed, and *latent* ambiguities, or those which arise where the words of the deed in

(*k*) See *supra*, § 179. (*l*) Baylis *v.* Atty.-General, 1741, 2 Atk., 239—Castledon *v.* Turner, 1745, 3 Atk., 257—Hunt *v.* Hort, 1791, 3 Bro. C. C., 311—*contra*, Pollock *v.* Gilmour, 1777, M., 8098, and M., Appx. "Legacy," No. 1, questioned in Blair *v.* Blair, 1849, 12 D., 112, per L. Cockburn. See § 160. (*m*) Ulrick *v.* Litchfield, 1742, 2 Atk., 372. So parole is inadmissible for proving to which of two antecedents a certain relative applies; L. Walpole *v.* L. Cholmondeley, 1797, 7 Durf. and E., 138—Castledon *v.* Turner, *supra*. (*n*) Strode *v.* Russell, 1708, 2 Vern., 625. See also Goodinge *v.* Goodinge, 1749, 1 Ves. Sen., 280—Edge *v.* Salisbury, 1749, Amb., 70—Green *v.* Howard, 1779, 1 Bro. C. C., 31. (*o*) *Supra*, § 202.

(*p*) *Supra*, §§ 194, 196.

[15] A legacy was left to the Scottish Missionary Society of the Established Church of Scotland. It was competed for by the Scottish Missionary Society, which was unconnected with any denomination, and by the Home Mission Committee of the Church of Scotland, the objects of the latter society not being strictly missionary. The majority of the Court held the legacy should go to the Scottish Missionary Society, and the words "of the Established Church of Scotland" only *falsa demonstratio;* Scottish Missionary Society *v.* Home Mission Committee, 1858, 20 D., 634. Parole evidence was admitted to explain a devise to William Marshall, "my second cousin," the testator having no second cousin of that name, but two cousins once removed, whose names were William Marshall and William J. R. B. Marshall; Bennet *v.* Marshall, 1856, 2 Kay and J., 740. See as to the evidence competent for the purpose of identifying entailed lands, Earl of Leven and Melville *v.* Cartwright, 1861, 23 D., 1038, and 33 J., 521.

themselves are neither ambiguous nor obscure, but are shewn to be equally applicable to more than one person or thing (*r*).

§ 215. On the one hand, a *latent* ambiguity may be solved by proving which of several objects the granter intended by a description which applies indifferently to them all (*s*). Thus where an instrument of sasine described the bailie as "Brown in Dubbs," and it was averred that there were more persons than one answering the description, extrinsic proof was held admissible for pointing out which of them had been intended (*t*). And in an English case where lands had been left to John Cluer of Calcot, and there were two persons, father and son, who corresponded to that description, parole of the testator's intention to bequeath to the son was admitted (*u*). So where a devise was to "John Allen, the grandson of my brother Thomas, and I hereby charge the same with the payment of £100, to each and every the brothers and sisters of the said John Allen, to whom I give the same accordingly;" and it appeared that at the date of the will, Thomas, the testator's brother, had two grandsons named John Allen, one of whom had several brothers and sisters, while the other had one brother and one sister; the Court received proof of the testator's declarations, although uttered after the date of the will, to shew which grandchild he had intended (*x*). On the same principle where the lands of Craig are sold, and the seller has North and South Craigs, parole is admissible to shew which he intended (*y*).

In the cases thus noticed, the object of the extrinsic proof was not merely to shew circumstances in relation to the granter, from which the Court might by construction ascertain the meaning of the deed; but, on the footing that the deed when read by the light of surrounding circumstances was still ambiguous, proof of the granter's intention was admitted, in order that the Court might, as in a question of fact, determine which object he meant to point out by the latently ambiguous description. Since, therefore, the ex-

(*r*) This distinction was introduced into English law by L. Bacon (Maxims Reg., 23); and is fully discussed in Wigram on Wills, 101 (proposition vii)—3 Starkie Ev., 755, 768, 1269—2 Phil. Ev., 311—2 Taylor Ev., 781—Sugden on Vendor and Purch., 174.

(*s*) Bell's Pr., § 524—per Lord Ch. Brougham in Logans *v.* Wright, 1831, 5 W. S., 246—and in Morton *v.* Hunters & Co., 1830, 4 W. S., 386—Wigram, *supra*—Starkie, *supra*—2 Phil., 315—Taylor, *supra*—Sugden on Vendor and Purch., 175.

(*t*) Morton *v.* Hunters, *supra*. (*u*) Jones *v.* Newman, 1750, 1 W. Black., 60; explained in Doe *v.* Hiscocks, 1839, 5 Mee. and Wel., 370. (*x*) Doe d. Allen *v.* Allen, 1840, 12 Ad. and El., 541; 4 Per. and Dav., 220, S. C. See a similar case, Doe d. Gord *v.* Needs, 1836, 2 Me. and Wel., 129. (*y*) Macfarlane *v.* Watt, 1828, 6 S., 556, per L. Pitmilly—Meers *v.* Ansell, 1771, 3 Wils., 275—3 Starkie, 769.

trinsic evidence is admissible to prove intention as an independent fact, it may embrace both circumstances which indicate intention (*z*), and declarations of intention made at the time of granting the deed (*a*). Whether declarations uttered before or after its execution will be received, seems to depend on circumstances, as the occasions on which they were made, their dates compared with the date of the deed; the question being whether the particular declaration tendered is relevant to infer intention as at the date of the deed (*b*).*

§ 216. On the other hand it has been laid down repeatedly, and with authority, that evidence of the granter's intention is inadmissible for the purpose of clearing up a *patent* ambiguity. In a Scotch case already cited, Lord Chancellor Brougham observed, "you are not to go out of the deed, where there is no latent ambiguity but only a patent ambiguity, in order by any extrinsic evidence to clear up a doubt that arises before your eyes upon the face of it. If it is a latent ambiguity, if evidence dehors the deed raises that doubt, you may have recourse to evidence dehors the deed to settle it. That rule is as old as the time of Lord Bacon, when he held the Great Seal, and that rule holds in all the Courts here and in Scotland" (*c*). The same learned judge repeated this doctrine in another case which had been appealed from the Court of Session (*d*). Professor Bell thus states the rule,—"There are two kinds of ambi-

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(*z*) Selwood *v.* Mildmay, 1797, 3 Ves. Jun., 306—Doe d. Chevalier *v.* Huthwaite, 1820, 3 B. and Ald., 632—Keiller *v.* Thomson's Tr., 1826, 4 S., 724, *supra*, § 208—Wigram, p. 162. (*a*) Selwood *v.* Mildmay, *supra*—Hampshire *v.* Pierce, 2 Ves. Sen., 216. (*b*) Both previous and subsequent declarations have been held admissible; Beaumont *v.* Fell, 1823, 2 P. Will., 140—Doe d. Hiscocks *v.* Hiscocks, 1839, 5 Me. and Wel., 363, per Abinger—Price *v.* Page, 1799, 4 Ves., 680—Whitaker *v.* Tatham, 1831, 7 Bing., 628—Doe d. Allen *v.* Allen, *supra* (*z*). In Trimmer *v.* Bayne, 1802, 7 Vesey, 517, Lord Chancellor Eldon observed, "I fear there is no possibility of saying parole declarations, both previous and subsequent, are not admissible." "But there is a very great difference upon the point whether they are all equally weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will as to what he had done, is entitled to more credit than one before the will as to what he intended to do; for that intention may very well be altered, but he knows what he has done." See also Wigram, 162—See *contra*, Thomas *v.* Thomas, 1796, 6 Durf. and E., 671.

* In thus treating of the mode of solving latent ambiguities, the views adopted by Vice-Chancellor Wigram in his admirable Treatise on the Interpretation of Wills (pp. 101, *et seq.*), have been in a great measure followed, as being most consistent both with principle and with the English authorities, to which a copious reference has been indispensable. See § 229.

(*c*) Logans *v.* Wright, *supra*, 1831, 5 W. S., 246. (*d*) Morton *v.* Hunters & Co., *supra*, 1830, 4 W. S., 386.

guity, which are to be dealt with differently, 1st, An ambiguity patent or apparent on the face of the contract, which, unless it can be solved by the context and nature of the contract, may be fatal; 2d, A latent ambiguity, arising not from the words, but in their application; and in this case extraneous evidence is admissible to clear up the difficulty" (*e*).

§ 217. The same rule holds in England. It is thus stated by Chief-Justice Gibbs: "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. Then, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity (*f*)." The doctrine is more fully expounded by Lord Abinger in a leading case in the Exchequer. After noticing that the circumstances surrounding the testator may be proved in order to illustrate the meaning of the will, his Lordship observed—"There is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now there is *but one case* in which it appears to us that this sort of evidence of intention can properly be admitted; and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S to A B, and has two manors of North S and South S, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls an 'equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that in all other cases parole evidence of what was the testator's intention, ought to be excluded upon this plain ground,

(*e*) Bell's Pr., § 524.

(*f*) Oxenden *v.* Chichister, 1816, 4 Dow, 93.

that his will ought to be made in writing, and if his intention cannot be made to appear by the writing explained by circumstances, there is no will" (*g*).

The English text writers also agree in holding that while latent ambiguities may, patent ambiguities may not, be cleared up by proof of the granter's intention (*h*).

§ 218. From the dicta of the Lord Chancellor sitting in the Scottish Court of last resort, the opinion of a leading institutional writer (Professor Bell), and the English authorities above cited, the rule will probably be held as fixed, that proof of intention is inadmissible in order to explain a patent ambiguity. There is, however, not a little looseness and some conflict in the English authorities on the point (*i*); while no satisfactory reason has yet been given for the distinction in this respect between patent and latent ambiguities. It is usually defended on the ground that as a latent ambiguity is raised by evidence dehors the deed, it may be laid or removed by the same means (*j*). Vice-Chancellor Wigram (*k*) has exposed the fallacy of this explanation, which would be perfectly logical if the extrinsic proof admitted to remove the ambiguity were of the same character as that by which it had been raised. But the ambiguity arises in the attempt to identify the person or thing described in the deed, without proof of the granter's intention as an independent fact; whereas the rule in question allows the ambiguity so raised to be solved by proof, direct or circumstantial, of intention. Mr Wigram (*l*) accordingly sums up his remarks on this point by observing that the decisions admitting evidence of intention "must be considered to a great extent as arbitrary and not to be explained upon any determinate principle. They appear to be decisions in which a general principle has been sacrificed to meet the hardship of particular cases."

§ 219. It will be kept in view, however, that the exclusion of extrinsic evidence in cases of patent ambiguity is limited to proof of the granter's intention as a fact independent of the deed (*m*). Evidence of any facts relating to the subject conveyed (*n*), of any material circumstances which surrounded the granter (*o*), and of the meaning of peculiar phrases occurring in the deed (*p*), is

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(*g*) Doe *v.* Hiscocks, 1839, 5 Mee. and Wel., 368, 369. (*h*) 3 Starkie, 755, 768—Taylor, 785—Sugden on Vend. and Purch., 175—Wigram, 134—2 Evans' Pothier, 208. (*i*) See Wigram, 130. (*j*) Morton *v.* Hunters, *supra*, 4 W. S., 387.
(*k*) Wigram, 121. (*l*) Wigram, p. 130. (*m*) See Wigram, 177.
(*n*) *Supra*, § 205, *et seq.* (*o*) *Supra*, § 202, *et seq.* (*p*) *Supra*, § 194, *et seq.*

equally admissible whether the ambiguity is patent or latent. The difference between such evidence and evidence of intention is well illustrated by the mode in which the Court explicate the term "heirs." That is a flexible, or patently ambiguous, term; the meaning of which varies with the nature of the subject conveyed, the antecedent titles of that subject, and even of other subjects to which it may be accessory (*q*). Accordingly, in order to ascertain the meaning of the term in any instance, these extrinsic circumstances are not only admissible, but most material. For example, the primary meaning of the word is the heir *ab intestato* in heritage (*r*). Yet in conveyances of a *feudum novum* it means heir of conquest (*s*);[16] while in personal bonds and deeds which transfer personal estate, it points to the party's executors (*t*). If there has been a previous destination of an estate, limiting the succession, the general term heirs, or heirs whatsoever, will in all the subsequent destinations of the subject be understood as describing, not the heirs at law, but the heirs of the former investiture, unless strong circumstances raise the inference that the original destination was meant to be altered (*u*).[17] Again, where one who has taken a right to himself and to heirs of a certain character, acquires adjudications, reversions, or any collateral securities affecting the subject, and takes the conveyances thereto to himself and his heirs, that term will be construed to mean the heirs to whom the lands were provided; as it is not to be presumed that a party would make one class of his heirs the debtors, and another class the creditors on the same subject (*v*). For a similar reason, where a proprietor in a *feudum antiquum* purchases the teinds of his lands under a disposi-

(*q*) Ersk., 3, 8, 47. (*r*) Ersk., *supra*. (*s*) Ersk., *supra*.
(*t*) Ersk., *supra*—Pearson *v.* Corrie, 1824, 4 S., 119—Blair *v.* Blair, 1849, 12 D., 97.
(*u*) Ersk., *supra*—Hay *v.* Crawford, 1698, M., 14,899—Skene *v.* Forbes, 1725, M., 11,354—M. Clydesdale *v.* E. Dundonald, 1727, M., 14,930—Rankine *v.* Rankine, 1786, Elch. "Mutual contract," No. 4—Patons *v.* Hamilton, 1797, M., 11,376—Wilson *v.* Wilson, 1811, Hume D., 534. (*v*) Ersk., *supra*—Wauchope *v.* D. Roxburghe, 14th December 1815, F. C.; affd. 1 W. S., 41.

[16] A destination in favour of "heirs whatsoever" of a party, operates, if he takes no right himself, in favour of his heir of line, not his heir in conquest. Where an estate, conquest in the granter, was destined to the grandchildren of the granter, whom failing, to the granter's "heirs whatsoever," and the grandchildren took the estate and died in childhood, it was held that the granter's heir of line was entitled to succeed; had the grandchildren not taken the estate, the granter's heir in conquest would have succeeded; had the destination been to the grandchildren and *their* "heirs whatsoever," their heirs in conquest would have taken; Robison *v.* Robison, 1859, 21 D., 905.

[17] Menzies on Conveyancing, 2d edition, 669; 3d edition, 699.

tion to himself and his heirs, these, although a *feudum novum*, go to his heir in heritage (*w*).

§ 220. From these cases (*x*) it will be seen that the extrinsic inquiry is admissible in order to discover what intention the granter has expressed by a word which has different but fixed meanings in different circumstances. When the meaning of the word has been so ascertained, the deed, no longer ambiguous, must receive its proper legal effect; and it is therefore incompetent by parole, by the instructions given for preparing the deed, or by any other extrinsic evidence, to prove that the granter meant to attribute some peculiar meaning to the word referred to (*y*).[18]

§ 221. *Tenthly*—Where, from two provisions or bequests to the same effect occurring in separate deeds, the question arises whether both or only one be effectual, it would seem that extrinsic evidence is admissible to solve the difficulty.

§ 222. On this point it is necessary to observe, that when a testator leaves two testamentary deeds or bequests in favour of the same persons, the primary rule is, that unless the one is revoked by the other expressly, or by plain implication, both shall receive effect, as such must be presumed to have been the granter's intention (*z*). Yet this presumption will yield to a contrary inference, where the terms of the deeds imply that the second bequest, if identical in amount with the first, was meant to be a repetition of it, or if differing in amount, was intended to be substitutionary: the burden of proof always lying on the party who maintains that

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(*w*) Greenock *v.* Greenock, 1736, M., 5612. But an heir of entail purchasing his teinds under a fee-simple title, does not bring them under the fetters of the entail; entails being *stricti juris*, and depending on statute; Spalding *v.* Laurie, 1784, M., 14,461. See also Galbraith *v.* Graham, 14th January 1814, F. C. (*x*) The cases thus cited are merely by way of illustration; a full exposition of the law on the point being beyond the scope of this treatise. The authorities are collected in Blair *v.* Blair, 1849, 12 D., 97; and are very fully and ably analysed in the session papers of that case (Advocates' Library Collection). (*y*) The cases on this point are cited *supra*, § 192, (*v*), (*w*). (*z*) Stoddart *v.* Grant and Others, 1852, 1 Macq., 163; reversing 11 D., 860—Gillespie *v.* Donaldson's Tr., 1831, 10 S., 174—Sutherland *v.* Sutherland, 1825, 4 S., 220—Elliot *v.* L. Stair's Tr., 1823, 2 S., 250—Clark *v.* Hay, ib., 313—Straton's Tr. *v.* Cunningham, 1840, 2 D., 820—Bell's Pr., § 1871—1 Williams on Executors, 134.

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[18] The judgment in the case of Robison *supra* involved the apparent anomaly, that the meaning of the term "heir whatsoever," and the intention of the granter, were held to be affected by events happening after the granter's death. But the Court held that to be no sufficient objection to the judgment; Robison *v.* Robison, *supra*.

only one of the bequests was meant to stand (*a*). In determining this question, the Court will look chiefly at the terms of the deeds themselves. But they may also admit the extrinsic fact that the testator's fortune increased or diminished between the dates of his deeds, as that throws considerable light on the question (*b*).[19]

§ 223. It is not so clear whether evidence, direct or circumstantial, of the testator's intention can be admitted. In one old case, where a party by two deeds, executed within a fortnight of each other, mortified certain annuities for the board and education of poor children, both deeds being precisely the same, except only that the later in date appointed one more boy to be educated, and mortified a larger sum, than did the former,—in a question whether the second was to be held as additional to or substitutional for the first, the Court of Session found that the two mortifications subsisted as separate deeds. The truster's heir reclaimed against this judgment, and prayed that the person who prepared and wrote both deeds, and who was one of the instrumentary witnesses to both, should be examined as to the truster's directions and declarations on the point in issue, and generally as to whether it was his intention that both should subsist, or that the second should include the first and stand alone. The Court of Session having refused this petition, the House of Lords on appeal altered the judgment, and remitted with an order on the Court to allow the proof craved (*c*). The proof was thus received in order to show that the granter of the two deeds intended that only one of them should stand. Its object was to redargue the legal construction of the deeds as both subsisting declarations of intention. In another case where two legacies of the same amounts had been left to the same persons, the Court had regard to the fact that the testator's affection for them had increased, while he had no predilection for his heir-at-law; and, proceeding partly on that proof, the Court gave effect to the double bequest (*d*). It would seem that proof of intention is

(*a*) Horsburgh *v.* Horsburgh, 1847, 9 D., 331—2 Williams on Ex., 1107, and cases there cited—Cases in note (*z*). (*b*) Per Lord Truro in Stoddart *v.* Grant, *supra* —Lindsay *v.* Henderson, 1827, 5 S., 297—per Lord Jeffrey in Horsburgh *v.* Horsburgh, *supra*—Guy *v.* Sharp, 1833, 1 My. and Kee., 589. (*c*) Falconer *v.* Falconer, 1721, Rob. Ap., 377—See also Ker *v.* Wauchope, 1694, 4 B. Sup., 201.

(*d*) Lindsay *v.* Henderson, *supra*.

[19] There is a presumption in the law of England against double portions in family settlements, but (per Lords Chelmsford and Wensleydale, Lord Cranworth dissenting) not in the law of Scotland; Kippen *v.* Darley, 1858, 3 Macqueen, 203—Beattie *v.* Thomson, 1861, 23 D., 1163—Hopwood *v.* Hopwood, 1859, 7 Clark's H. of L., 728.

admissible in England, where two bequests are so nearly alike as to create the inference that only one of them was meant to take effect (*e*). In allowing that inference to be overcome by proof of actual intention, the Court in effect support the declared intention of the granter, as the object is "not to show that the testator did not mean what he has said, but on the contrary to prove that he did mean what he has expressed" (*f*). This principle applies in England wherever the proof is tendered to "rebut an equity" (*g*); as, for example, to show that a debtor leaving his creditor a legacy did not mean that it should go in satisfaction of the debt (*h*), to prove that a portion advanced to a child after the date of a will, was not intended to be an ademption of a legacy to the same amount (*i*). But where the Court, on construing the deeds together conclude that they are both subsisting, extrinsic evidence is inadmissible in England (except in replication) for the purpose of proving that they are substitutionary, because such evidence would contradict and limit the expressions in the deed (*k*).[20]

The competency of thus proving intention has been challenged in a recent case; where the Court considered that the intention of the testator was to be determined solely from the terms of the deeds themselves (*l*). But the question of the admissibility of extrinsic evidence did not require to be decided in that case.

§ 224. *Eleventhly*—In construing ambiguous expressions in deeds, especially those of ancient date, it is competent to prove the usage or possession which has followed on them, and which is the parties' own exposition of their language and intentions. This, indeed, is the best mode of explaining obscure or obsolete expressions in old writings (*m*).

(*e*) Hurst *v.* Beach, 1821, 5 Mad., 351, adopted by L. Ch. Sugden in Hall *v.* Hill, 1841, 1 Dru. and War., 127—Coote *v.* Boyd, 1789, 2 Br. C. C., 521—Lee *v.* Pain, 1844, 4 Hare, 216. But see *contra*, Guy *v.* Sharp, *supra*. (*f*) Per Sir J. Leach, in Hurst *v.* Beach, *supra*. (*g*) Taylor, 792—3 Starkie, 783—Langham *v.* Sanford, 1816, 19 Ves., 641. (*h*) Cuthbert *v.* Peacock, 1707, 2 Vern., 598.

(*i*) Debeze *v.* Mann, 1787, 2 Bro. C. C., 165—Ellison *v.* Cookson, 1788, ib., 307, 1 Ves., 100 S. C.—Trimmer *v.* Bayne, 1802, 7 Ves., 508. (*k*) Hurst *v.* Beach, 1821, 5 Mad., 351—Hall *v.* Hill, 1841, 1 Dru. and War., 127, per L. Ch. Sugden—Guy *v.* Sharp, 1833, 1 My. and Kee., 608, per L. Ch. Brougham—But see Coote *v.* Boyd, 1789, 2 Br. C. C., 521—Campbell *v.* E. Radnor, 1783, 1 Bro. C. C., 271.

(*l*) Horsburgh *v.* Horsburgh, *supra*, particularly opinion of Lord Justice-Clerk Hope.

(*m*) Per L. Wynford in Heriot's Hospital *v.* M'Donald, 1830, 4 W. S., 101; affirming S. D. Teind Ca., 156—2 Phil., 346—Taylor, 780—3 Starkie, 775—Sugden on Vend.

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[20] Roper on Legacies, 4th edition, 1028.

§ 225. Accordingly, where a charter described its subject both by measurement and as possessed by A B and bounded by a certain yard, and a question rose whether a piece of ground included in the description by measurement, but not so possessed or bounded, was conveyed, the Court, on considering a proof which they had allowed before answer, held that the description by measurement was erroneous, and must be controlled by the possession and boundaries (*n*). So in a question between a superior and vassal as to their respective liabilities for parish burdens under a doubtful clause in the feu-charter, proof of their mutual actings for a number of years after its date is admissible and important to solve the difficulty (*o*). Thus also a thirlage on tenants within a certain barony to grind the "whole grindable corn and grains at the barony mill," may be explained by supervening usage to mean a thirlage of all growing corn except seed and horse corn, being the thirlage which the barony mill had enjoyed by immemorial custom (*p*). On the same principle in construing crown charters to burghs and other ancient deeds, the English Courts have repeatedly given effect to contemporaneous and consequent usage (*r*).

§ 226. This kind of proof is also admissible in questions as to the articles subject to impost, and the amount of dues exigible, under ancient Acts of Parliament in favour of magistrates of burghs and the like (*s*).

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and Purch., 178. The English authorities speak of this as proof of *contemporaneous* usage. But that term does not accurately define usage which, *ex hypothesi*, must always follow on the instrument in question. See per Lord Brougham in Mag. of Dunbar *v.* Her. of Dunbar, *infra*, § 226. (*n*) Clark *v.* Scott, 1826, 5 S., 109; 6 S., 1028.

(*o*) Bruce *v.* Carstairs, 1773, M., 2333; affirmed on appeal—Dundee Masters and Seamen *v.* Wedderburn, 1830, 8 S., 547—Heriot's Hospital *v.* Macdonald, *supra*, (*m*)—Imrie *v.* Heriot's Hospital, 1828, S. D. Teind Ca., 152. (*p*) Simson *v.* Fordyce's Tr., 1824, 3 S., 225. See Cunningham *v.* Dunlop, 1836, 15 S., 295, where, in a question as to the extent of a servitude of pasturage fixed by decree-arbitral, proof of the subsequent possession was admitted. See also L. Falconer *v.* Taylor, 1775, 2 Pat. Ap. Ca., 373—Falconer *v.* Lawson, 1778, ib., 442—Cochran *v.* Wallace, 1820, 2 Mur., 297—Beattie *v.* Law, 1787, Hume D., 729. (*r*) R. *v.* Varlo, 1775, 1 Cowp., 248—Blankley *v.* Winstanley, 1789, 3 Durf. and E., 279—R. *v.* Bellringer, 1792, 4 ib., 810—R. *v.* Miller, 1795, 6 ib., 280—per L. Ch.-Just. Tindal, in Shore *v.* Wilson, 1842, 9 Cl. and Finn., 569—In Att.-Gen. *v.* Drummond, 1842, 1 Dru. and War., 368, Lord Chancellor Sugden observed—"One of the most settled rules of law for the construction of ambiguities in ancient documents is, that you may resort to contemporaneous usage to ascertain the meaning of the deed. Tell me what you have done under such a deed, and I will tell you what the deed means." See also Sugden on Vend. and Purch., 178—2 Phil., 846—3 Starkie, 775—Taylor, 780. (*s*) Mag. of Linlithgow *v.* Edin. and Glas. Railway Co., 1845, 7 D. 1071; 1 Macq. Ap. Ca., 1—Milne *v.* Leys, 1852, 14 D., 798—Murray *v.* Liston, 1843, 5 D., 1054—Girdwood *v.* Campbell, 1829, 7 S., 840,

§ 227. Even public statutes of ancient date may be construed by the light of contemporaneous and consequent usage, as the expositor of their scope and meaning (*t*). Thus, in construing the important public statute of 1579, c. 74, where the question was whether the poor of a parish, which contained both a landward district and a burgh, were to be managed and maintained separately or as the poor of one parish, proof of the relative usage was held in the House of Lords to be admissible as explaining the statute, the terms of which left the question doubtful (*u*). So in a question whether interlocutors pronounced by presbyteries required to be authenticated in terms of the Act 1686, c. 3, which applies to "all interloquitors pronounced by the Lords of Councill and Session, and all other judges within the kingdome," proof of the usage on the point was admitted, and was the chief ground on which both the Court of Session and House of Lords sustained the interlocutors in question, although they did not bear the statutory authentication (*x*). And in a recent case, not yet reported, where the question was whether the provisions of the Acts 1633, c. 6—1690, c. 17—1693, c. 22—1706, c. 6—regarding the right of presbyteries to supervise schools and universities, applied to a certain public burgh school,

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and 9 S., 170—E. Aboyne *v.* Mag. of Edinburgh, 1775, M., 1972—See also Mag. of Lauder *v.* Brown, 1754, M., 1987; 5 B. Sup. 819, S. C.—Mag. of Dunbar *v.* Kelly, 1829, 8 S., 128—Mag. of Wigtoun *v.* M'Clymont, 1834, 12 S., 289. As to the effect of usage following on royal charters and statutes creating a university, see Senatus Academicus of Edinburgh *v.* Mag. of Edinburgh, 1851, 14 D., 74, now (April 1854) under appeal.[21] (*t*) Besides the authorities in the following notes, see Stair, 3, 3, 6—Ersk., 1, 1, 45—Meldrum *v.* Tolquhon 1675, M., 5737—Henry *v.* Pearson, 1838, 16 S., 827—Sugden on Vend. and Purch., 178—3 Starkie, 777—Shephard *v.* Gosnold, Vaughan's Rep., 169—R. *v.* Scott, 1788, 3 Durf. and E., 604.

(*u*) Mag. of Dunbar *v.* Her. of Dunbar, 1835, 1 Sh. and M'L., 134, 195. In giving judgment in this case, Lord Brougham observed,—"It is quite true that as against a plain statutory rule no usage is of any avail. But this undeniable proposition supposes the statute to speak a language not to be misunderstood, a language plainly and indubitably differing from the purport of the usage. When the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions where any are given; or, when the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed sense; *optimus legum interpres consuetudo*, which is sometimes termed contemporaneous exposition; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the period of contemporary exposition." The Court below were divided on the point, 11 S., 879. (*x*) Ferguson *v.* Skirving, 1850, 12 D., 1146; affirmed 1 Macq., 232.

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[21] Affirmed 26th May 1854, 26 J., 5 0.

the Court were of opinion (but did not decide the point) that proof of the usage by which the statutes had been followed was admissible in explication of their scope and meaning (*y*).[22]

§ 228. But while usage is admissible to explain such writings in so far as their construction is doubtful, it cannot be received for the purpose of altering or controlling their meaning when clear (*z*). The allegation that a right constituted by writing has been lost or limited by non-use, must be maintained upon the law of prescription.

CHAPTER III.—OF THE ADMISSIBILITY OF CUSTOM AND USAGE OF TRADE TO MODIFY OR EXPLAIN WRITINGS.

§ 229. It has already been seen that extrinsic evidence is admissible to prove any peculiar meaning which custom or usage of trade has assigned to words occurring in a deed (*a*), and that ambiguous expressions may be read by the light of the usage by which the deed has been followed (*b*). An important class of questions remains,—namely, as to proving the custom of a district or community, or the usage of a particular trade, in order to supply omissions, or to modify expressions, in written contracts and obligations.[1]

§ 230. In the first place, it is clearly incompetent for one of the parties to a written contract to prove custom in contradiction of the writing; because "the engagements of the parties to each other by the express stipulations of a written instrument exclude all consideration of the custom of the country" (*c*).[2] This rule (which

(*y*) Presb. of Elgin *v.* Mag. of Elgin, 7th March 1854.[22] (*z*) Per Lord Brougham, in Mag. of Dunbar *v.* Her. of Dunbar, *supra*—R. *v.* Varlo, 1775, 1 Cowp., 248—R. *v.* Miller, 1795, 6 Durf. and E., 280—3 Starkie, 775. (*a*) *Supra*, § 194, *et seq.* (*b*) *Supra*, § 224, *et seq.* (*c*) Duke of Roxburghe *v.* Robertson, 17th July 1820, 2 Bligh, 156, 168, per L. Ch. Eldon; reversing 28th June 1816, Hume D., 867—Bell's Pr., 101. See also Taylor, 765, 9—2 Phil., 345.

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[22] Reported 1861, 24 D., 287. It was proved that the school was a public burgh school; and on the questions, Whether the acts applied to burgh schools, or to parish schools only, and whether, if they applied to both, the right of the presbyteries had been derelinquished as to burgh schools, it was held that the acts applied, and that the usage in the burgh had been in conformity with the acts; and the right of the presbytery was sustained without proof of usage in other burghs, which was not allowed.

[1] The usage will not receive effect if unreasonable, unrighteous, or unfair; Paxton *v.* Courtnay, 1860, 2 F. and F., 131—Bottomley *v.* Forbes. 5 Bing. N. C., 121—Cuthbert *v.* Cumming, 1855, 11 Hurl. and Gord., 405, and 10 Hurl. and Gord., 809.

[2] Muncey *v.* Dennis, 1856, 1 Hurl. and Norm., 216.

hardly requires authority), is well illustrated by some cases in the House of Lords, where leases which provided that all the fodder except hay should be consumed on the land and never be sold or removed, and that all the dung should be laid on the farm the last year of the lease, were not allowed to be controlled by proving the custom of the district to remove the straw of the way-going crop (*d*). So where a contract for building a corner house fully specified the rate per yard, &c., for the different parts of the building, and the house was built according to a plan which showed there was circular work, and which was held in the circumstances to have formed part of the contract, the builder was not allowed to prove a practice to charge double prices for circular building (*e*).

§ 231. Proof of custom is inadmissible, not only where the written contract expresses, but also where it fairly implies, a contrary stipulation (*f*). Accordingly, where a written lease contained full provisions as to the tenant's remuneration for improvements, he was not allowed to prove a custom by which the landlord gave his tenants an additional allowance, although such proof would not have expressly contradicted the deed (*g*). And where a written lease, which was full and minute in its stipulations, did not take the tenant bound at his entry to pay for the preparation of the summer fallow by the outgoer, the landlord, who paid the amount to the outgoer, was not allowed to prove that by the custom of the district the incoming tenant had to refund it to him (*h*). So where the powers of the manager of a company were detailed in writing, and he offered to prove that by usage of trade persons in his situation appointed the servants under them, the evidence was excluded, although the written contract was silent on the point (*i*). On the same principle where iron was bought under certain scrip-notes which described it as "good merchantable brand," the Court were of opinion that the purchaser could not prove that by the course of dealing of the sellers (who were extensive iron masters and iron merchants) brand from particular works ought to have been delivered (*j*).[3]

(*d*) Duke of Roxburghe *v.* Robertson, *supra*—Gordon *v.* Robertson, 1826, 2 W. S., 115; reversing 3 S., 656—Gordon *v.* Anderson, 1828, 3 W. S., 1; reversing 4 S., 13.

(*e*) Scott *v.* Hutton, 1827, 6 S., 283. (*f*) 2 Phil., 339—Smith's Lead. Cases, 306, 309—per Parke in Hutton *v.* Warren, 1836, 1 Me. and Wel., 466, 477.

(*g*) Gordon *v.* Thomson, 1831, 9 S., 735. (*h*) Alexander *v.* Gillon, 1847, 9 D., 524. (*i*) Gye & Co. *v.* Hallam, 1832, 10 S., 512. (*j*) Mackenzie *v.* Dunlop, 1853, 16 D., 129.[3] From the mode in which the point arose, it was not expressly decided.

[3] Judgment reversed; and held that it might be proved that, according to the general

The principle of these cases is, that as the contract by implication embraces the matter on which the proof of custom is tendered, the parties are presumed to have considered that matter, and not left it to be imported by parole into their agreement. In other words, the terms of the writing are more in accordance with the exclusion than with the admission of the extrinsic proof. Under a lease a portion of land was reserved for fallow and green crop, and it was provided that the tenant should plough that portion, and be allowed a certain sum for ploughing,—held that he could not claim an additional allowance at common law (*k*).[4]

§ 232. On the other hand, when a question arises on a point for which the written contract neither expressly nor by implication provides, the parties are presumed to have contracted with reference to the customary rule, which may therefore be proved as supplementing the written agreement. Thus where a feu-contract provided that each feuar should make up the street opposite to his own feu, but there was no provision as to making up the street opposite the vacant stances, one of the feuars was allowed to prove the practice of superiors to make up that part of the street (*l*). And where the trustees of an outgoing tenant sold the turnips of his last crop, and this was not excluded by the terms of the lease, proof that they had acted according to the custom of the district was admitted in an action by the landlord for the proceeds of the sale (*m*).[5]

(*k*) Shireff *v.* L. Lovat, 1854, 17 D., 177. (*l*) Hatton *v.* Peddie, 1830, 5 Mur., 157. (*m*) Hamilton *v.* Reid's Tr., 1824, 2 S., 611—See also M'Intosh *v.* Ogilvy's Tr., 1806, Hume D., 822—Wigglesworth *v.* Dallison, 1779, 1 Smith's Lead. Cases, 300.

usage of trade, the scrip notes, according to their true construction, referred to the special kind of iron alleged; and that as general usage of trade could be proved only by proof of an accumulation of particular usages, it was competent to prove that parties dealing with the defenders so understood their scrip notes; but the mere dealing of the sellers could not of itself control the meaning of the notes; Mackenzie *v.* Dunlop, 1856, 3 Macqueen, 22.

[4] A charterer of a vessel to China, the ship to be consigned to his agents, was not allowed to prove that, according to a custom in China, the agent there, as the charterer's consignee, was entitled to provide charters for the homeward voyage, because no such stipulation was in the contract; Phillipps *v.* Briard, 1 Hurl. and Norm., 21.

On proof that, according to the usage of a particular trade, a broker who purchased without disclosing his principal was liable as principal,—a broker was made liable as principal, notwithstanding that the terms of the bought and sold notes, though they did not disclose the principal, clearly expressed that the broker was contracting as an agent and not on his own account; Dale *v.* Humfrey, 1858, Ellis and Ellis, 1004.

[5] A custom that underwriters are not held liable for general average, in respect of the

§ 233. This principle is specially applicable to mercantile contracts, which are often expressed shortly and on the mutual understanding that the custom of trade regulates all matters not expressly provided for. Accordingly, "all contracts made in the ordinary course of trade, and without special stipulation, are presumed to incorporate the usage and custom of the trade to which they relate. The trade as exercised, and its usual practice known to the parties, are mutually understood to be within their intention in forming their bargain, and to be relied on in their execution of it" (*n*).[6] Thus where a contract of sale does not specify the term of payment, the buyer may prove usage of trade to allow a certain period of credit (*o*). Where a merchant in Aberdeen bought from a merchant in Rotterdam a certain quantity of timber, and a question arose, whether the timber delivered was of the proper size, the seller proved it was right according to the mode of measurement used in Rotterdam, while the purchaser contended that he was entitled to have the timber as by the measure used in Aberdeen. The chief question, therefore, having come to be, whether Rotterdam or Aberdeen was to be held the port of delivery, the Court allowed the purchaser's letter (which was silent on the point) to be shewn to mercantile witnesses, in order that they might state whether they would understand the delivery under the contract to be at Aberdeen or Rotterdam. The evidence also embraced the customary mode of measurement, on the supposition of Rotterdam being the port of delivery (*p*.) So in a case arising out of a written contract to make a road, the contractor taking the stones from a quarry belonging to the employer, the former was allowed to prove that by usage of trade the chips belonged to him (*q*).[7]

(*n*) 1 Bell's Com., 440. (*o*) Burbidge & Co. *v.* Sturrock, 1832, 10 S., 520.
(*p*) Schuurmans *v.* Stephens, 1832, 10 S., 839, and 11 S., 781.
(*q*) Inglis *v.* Cunninghame, 1826, 4 Mur., 74.

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jettison of goods stowed on deck, is a valid custom, and may be proved without contradicting the ordinary terms of a policy; Miller *v.* Fotheringham, 1861, 6 Hurl. and Norm., 278. Where bought and sold notes of mining shares specified the term of payment but not the term of delivery, it was held competent to prove a custom of delivering the shares on payment; Field *v.* Selean 1861, 6 Hurl. and Norm., Exch., 617.

[6] Gibson *v.* Small, 1853, 4 H. of L., 397—Smith's Leading Cases, 5th edition, vol. i, 529.

[7] Proof of custom was allowed, to show that a bale of gambier meant, in the Gambier trade, a package of a particular size and description,—that oil is "wet" if it contains any water, however small the quantity—that a contract to deliver "best palm oil" is implemented if one-fifth, or other substantial portion, of the oil delivered was best oil; Gor-

§ 234. But while custom of trade is thus admissible, wherever a contract *in re mercatoria* implies that such was the intention of the parties, it is not (in this country at least) received indiscriminately in mercantile agreements. Unless the terms of the writing are technical, the evidence of mercantile men will not be admitted to explain it; because the construction of a written contract is for the Court, not for the jury (*r*). And if the writing is so copious and precise in its stipulations, as to shew that it is a record of the whole agreement relating to the point in issue, and not merely a statement of some of its heads, the rest being left to usage of trade, the Court will give effect to the agreement as recorded, and will not allow stipulations to be added to it by a proof of usage (*s*). The sphere of this kind of evidence is therefore limited to interpreting any technical words in the document, and supplying any customary conditions which the parties may be presumed to have tacitly agreed to. Aided by such evidence, the Court will construe a mercantile agreement on the same principles as they apply to all written expressions of a person's intention.[8]

§ 235. Little assistance can be derived from the law of England in questions of this kind; for "there can be no doubt that we have never in Scotland gone so far as they have done in England in admitting evidence of understanding or usage in order to construe thereby a written document" (*t*).[9] Nor does there seem to be any reason for abandoning our own principles for the more lax rules of English law; since among the judges and text writers of that country there is a strong feeling towards limiting the admission of this kind of proof (*u*). It is more probable that our judges will profit by the experience which has satisfied eminent English

(*r*) Calder *v.* Aitchison, 1831, 9 S., 777; affirmed 5 W. S., 410—Haldane *v.* Gray, 1842, 4 D., 1307—Peter *v.* Terrol, 1818, 2 Mur., 31, per L. Pitmilly—Milne *v.* Samson, 1843, 6 D., 355—But see M'Laggan *v.* M'Farlane, 1813, Hume D., 101. See *supra*, § 193. (*s*) Gye & Co. *v.* Hallam, *supra*, § 231—Mackenzie *v.* Dunlop, Wilson, & Co., 1853, 16 D., 129. (*t*) Per Lord Justice-Clerk Hope in Mackenzie *v.* Dunlop, 1853, 16 D., 139. (*u*) Per Lord Brougham in Calder *v.* Aitchison, 1831, 5 W. S., 416, *supra*, § 199—*Per curiam* in Hutton *v.* Warren, 1835, 1 Me. and Wel., 475—Johnstone *v.* Usborne, 1840, 11 Ad. and El., 557—Per Lord Denman in Trueman *v.* Loder, ib., 597—Taylor, 771-3—Per Story in the schooner Reside, 1835, 2 Sumne (American), 567, cited in Taylor, 773.

risson *v.* Perrin, 1857, 2 Scott's C. B. N. S., 681—Warde *v.* Stewart, 1 Scott's C. B. N. S., 88—Lucas *v.* Bristow, 1848, Ellis and Ellis, 907.

[8] Myers *v.* Sarl, 1861, 30 L. J. Q. B., 8, 12.

[9] But the judgment in this case was reversed; MacKenzie *v.* Dunlop; see § 231, note 3.

lawyers, that the indiscriminate admission of such evidence has been attended with injustice.

§ 236. When a writing has been lost or withheld, the custom or usage of trade in the matters to which it relates is admissible along with other secondary evidence to prove its contents (*x*).

§ 237. As to the nature and extent of the custom required, where proof of custom is admissible, the rule is that it must be so uniform and notorious, that both parties may fairly be presumed to have had it in view when contracting (*y*); while, on the other hand, it does not require to be perfectly invariable (*z*).[10] The custom of the country will commonly prevail over any local usage in matters of a general mercantile character (*a*); whereas, in provincial matters, such as contracts for service, the custom in the district will be regarded, provided it be uniform and notorious (*b*). In leases, proof of a local custom will suffice; but it must be so extensive as to be well known and recognised; the practice on a small estate of three or four farms not being sufficient (*c*).[11]

(*x*) Crawford and Lindsay Peerage Case, 1848, 2 Cl. and Fin., 534; 13 D. (H. of Lords), 32—Brown *v.* College of St Andrews, 1851, 13 D., 1355. (*y*) 1 Bell's Com., 440—Bell's Pr., § 101—Per L. Ch. Commissioner in Inglis *v.* Cunningham, 1826, 4 Mur., 81. (*z*) Burbidge *v.* Sturrock, 1832, 10 S., 520—Morrison *v.* Allardice, 1828, 2 S., 434—Girdwood *v.* Campbell, 1831, 9 S., 170—Whealler *v.* Methuen, 1843, 5 D., 1221—Bell's Com., *supra.* (*a*) See Bell's Com., *supra*—Bell's Pr., § 101—Mackenzie *v.* Dunlop, Wilson & Co., 1853, 16 D., 129. (*b*) Morrison *v* Allardice, 1824, 2 S., 434—See *infra*, § 850. (*c*) Allan *v.* Thomson, 1829, 7 S., 784—

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[10] It requires long and invariable usage to supersede the general law of the country in any particular locality. So, where a proof was attempted that scourers of linen in Paisley had, in virtue of a local custom, a right to retain linen sent them for scouring, in security of an account due to them for scouring other quantities of linen, it was held that, as the usage proved was merely fluctuating and of a few years' standing only, it could not receive effect; Smith *v.* Aikman, 1859, 22 D., 344. On the other hand, to support a case on mercantile usage, "there needs not either the antiquity, the uniformity, or the notoriety of custom, which, in respect of all these, becomes a local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but, in the result, it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract"; Justice Coleridge (delivering opinion of Privy Council) in Ghose *v.* Manickchund, 1859, 7 Moore's Indian Ap., 268, 282.

A usage in Lloyd's Coffee-house, as to persons insuring there, was held not to apply where contracting parties were ignorant of it; Sweating *v.* Pearce, 1861, 9 Scott's C. B. N. S., 534; and the presumption that parties made an agreement with reference to a local usage, has no place when one of the parties does not know of the usage; in that case evidence of the usage will not be admitted; Kirchner *v.* Venus, 1859, 12 Moore's Privy Council Reports, 361.

[11] According to the Law of England, the custom of the country may be proved to

Under an issue whether a bill payable at a flesher's shop in Glasgow had been presented during business hours, the custom as to the hours of the fleshers in the district, or of fleshers generally, and not as to business hours in general, was held to form the rule (*d*).

There is sometimes a question which of two different usages, prevailing in different places, has to be regarded. It has been held that in an action on a policy with a Scotch insurance company, the equipment of sails, &c., must be complete according to the usage in Great Britain, not in Nova Scotia, where the vessel was built and owned (*e*) The usage prevailing in the port of delivery was held to fix the mode of measurement in a contract of sale of timber (*f*). In an action for the price of ornamental plaster work executed in Glasgow, the customary prices there were held to be the rule, and proof of those in London was refused (*g*). For a full discussion of the bearings of the *lex loci contractus*, the *lex loci solutionis*, and the *lex rei sitae*, in such questions, reference must be made to the work of Judge Story (*h*).[12]

§ 238. Proof of usage or custom will not be admitted to supplement the terms of a written contract, unless it is averred on record and covered by the issue (*i*).

Alexander *v.* Gillon, 1847, 9 D., 524—M'Leod *v.* Bruce, 1816, Hume D., 842—M. Tweeddale *v.* Brown, 1821, 2 Mur., 565—Compared with Bell *v.* Lamont, 24th June 1814, F. C.—1 Bell's Com., 74, 440. (*d*) Neilson *v.* Leighton, 1844, 6 D., 622.

(*e*) Cook *v.* Greenock Marine Ins. Co., 1843, 5 D., 1379. (*f*) Schuurmans *v.* Stephens, 1832, 10 S., 839; 11 S., 779. (*g*) Wilson *v.* Gordon, 1828, 6 S., 1012.—See also Whealler *v.* Methuen, 1843, 5 D., 1221. (*h*) Story, Confl., § 270, *et seq.* (*i*) Milne *v.* Samson, 1843, 6 D., 355—Mackenzie *v.* Dunlop, Wilson & Co., 1853, 16 D., 129—Guthrie *v.* Cochrane, 1846, 19 Sc. Jur., 69.

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affect the terms of a tenancy, but, under that rule, evidence of the usage of a particular estate is not admissible unless it be shewn that the tenant was aware of it. "The law takes cognisance of the division of the country into counties and parishes, which are legal and public divisions, but not into properties or estates, which are purely private"; Pollock, C. B., Womersley *v.* Dally, 1857, 26 L. J. Exch., 219.

[12] Where the defendant, by a charter party executed in London, agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar molasses," the custom at Trinidad, to pack up such cargoes in a certain manner, was held imported into the contract, although there was no such custom at London; Cuthbert *v.* Cumming, 1855, 11 Hurl. and Gord., 405, and 10 Hurl. and Gord., 809.

CHAPTER IV.—OF CONTRADICTING AND MODIFYING DEEDS BY WRIT OR OATH OF PARTY.

§ 239. The terms of every writing may be contradicted, restricted, or modified by the oath on reference of the party founding upon it, or by his writ emitted after its date. Thus where a deed narrates a price paid, non-payment may be proved by the granter's writ or oath (*i*). The oath of party was admitted to prove that a clause in a lease, binding the parties respectively to pay for ameliorations or deteriorations (as the case might be) at its expiry, included a mill erroneously and contrary to the real agreement (*j*). It was proved by oath of party that the true consideration in a bond bearing to be for borrowed money was an indenture with the debtor's son as an apprentice; whereon parole evidence of maltreating the son was admitted as a ground for suspending diligence on the bond (*k*). And oath of party was received to prove that a bond was granted for the price of a horse, whereupon a condition to take back the horse if it did not please, and the existence of latent flaws in it, were proved by witnesses (*l*). Writ or oath is also admissible to show that a disposition *ex facie* absolute was conditional, and that it was a blunder to state the contrary (*m*). And the existence of a latent condition voiding the contract may be proved by oath of party; so as to let in parole evidence of non-implement (*n*). By statute, also, writ and oath of party are admissible to prove the ground of reduction on the Act 1621, c. 18, for defeating fraudulent alienations by bankrupts; and they are the only competent evidence of trust under the Act 1696, c. 25.

§ 240. It is competent to prove by writ or oath that a deed was modified by subsequent agreement, as where it is alleged that the term of removal in a lease was delayed (*o*), or the rent abated (*p*), or that written instructions to a broker were altered verbally (*r*).

(*i*) Gordon *v.* Trotter, 1833, 11 S., 696. (*j*) Lawson *v.* Murray, 7 S., 380—See also Fairney *v.* Lord Melville, 1662, M., 12,308. (*k*) Aikman, 1665, M., 12,311—See also Gun *v.* Fraser, 1714, M., 12,337. (*l*) Sim *v.* Inglish, 1674, M., 12,321—See also Kinnaird *v.* M'Dougal, 1694, 4 B. Sup., 184. (*m*) Stewart *v.* Ferguson, 1841, 3 D., 668, 674, per Lord Ordinary Ivory. (*n*) Wilkies *v.* Gordon, 1618, M., 12,407—Kinnaird *v.* M'Dougal, 1694, 4 B. Sup., 184.

(*o*) Thomson *v.* Terney, 1791, Hume D., 780—See Sharp *v.* Clark, 1807, Hume D., 577. (*p*) Gib *v.* Winning, 1829, 7 S., 677—See also Law *v.* Gibsone, 1835, 13 S., 396. (*r*) Stevenson *v.* Manson, 1840, 2 D., 1204.

The stipulations in a charter party may be modified by subsequent written directions, so as to constitute a new contract (*s*).

§ 241. A party's oath is admissible to prove that he renounced a right constituted by deed, as a written lease (*t*), or a bond (*u*), or to prove that a creditor with an infeftment of annual-rent accepted a part of the lands in satisfaction of his right (*x*), or that a creditor, on receiving part payment, discharged a debt on which he had led adjudication (*y*). Thus, also, a concert among creditors to suspend diligence against their common debtor was held binding, although not reduced to writing, and oath of party was received to prove it (*z*). The principle, indeed, holds universally that the law from favour to *pacta liberatoria* does not insist on written proof of them; since, if they are admitted on oath, there is no ground for doubting their genuineness (*a*).

§ 242. There is sometimes a difficulty as to the competency and effect of proving by oath of party obligations additional to those contained in a deed. The following distinctions are suggested on the point, on which there are few decisions. Wherever the additional obligation does not in itself require writing for its constitution, it may be proved by oath on reference, in order to compel specific implement (*b*). Again, if the party founding on a deed admits that a stipulation which in itself requires writing, was one of the conditions of the real agreement, he will not be allowed to enforce the deed without implementing the condition; which may thus indirectly be made effectual. One who founds on an additional stipulation which requires writing for its constitution, will also be allowed to enforce it specifically, if he proves its existence by his opponent's oath, and proves *prout de jure* that *rei interventus* has ensued on the faith of it (*c*). But, on the other hand, if the party founding on a deed denies on his oath on reference that it was contingent on or burdened with a verbal addition of this nature, the

(*s*) Hall *v.* Brown, 1814, 2 Dow, 367. (*t*) Craigmillar *v.* Chalmers, 1639, M., 12,308. (*u*) Hepburn *v.* Hamilton, 1661, M., 8465. (*x*) Ker *v.* Hunter, 1666, M., 8465. (*y*) Steil *v.* L. Orbiston, 1679, M., 8467. Here there had been *rei interventus* on the transaction. (*z*) M'Dougal *v.* Clapperton, 1726, M., 8468. (*a*) Ersk., 3, 2, 3—Tait, 225. On the same ground, an agreement to remove without warning may be proved by the tenant's oath; Edmonston *v.* Bryson, 1744, M., 12,415, 13,884—Ivory's Ersk., 382, note 135; and an agreement to dispense with renunciation of a lease may be proved by the oath of the landlord; Carlisle *v.* Lawson, 24th January 1732 (not rep.), cited in Edmonston *v.* Bryson, *supra*, and Ivory's Ersk., ib. (*b*) See Weir *v.* Russell, 1703, M., 12,331—Brisbane *v.* Glasgow Merchants, 1684, M., 12,328. (*c*) See § 166, and the chapters on *rei interventus*, below.

former may be enforced alone, and the latter, being an independent obligation not validly constituted, will fall; unless its defects have been removed by *rei interventus* (*d*).

§ 243. Where a written contract contains ambiguities, they may be cleared up by oath on reference as to the real meaning of parties (*e*).

(*d*) See on these points Tait, 226.

(*e*) Stewart *v.* Ferguson, 1841, 3 D., 668, per Lord (Ordinary) Ivory.

TITLE VI.

OF EVIDENCE AS DIVIDED INTO DIRECT AND INDIRECT; AND OF THE DIFFERENCE BETWEEN CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

The rules discussed in the preceding chapters relate chiefly to the admissibility of evidence. We proceed now to consider the different modes in which the evidence, when admitted, bears on the questions in issue.

§ 244. Every item of the evidence in a cause is either direct or indirect. By the former term is meant evidence expressly affirmative or negative of the issue. The only question therefore in regard to such evidence is, whether it is to be believed,—that is, whether the document is genuine and its contents true, or whether the witness has accurately observed and remembered, and has truthfully related, the facts to which he speaks. On the other hand, indirect (which includes circumstantial and presumptive) evidence, consists of a *factum probatum* of one kind, from which a different fact, the *factum probandum*, has to be inferred by a process of reasoning. Consequently, indirect evidence embraces two inquiries,—first, whether there is sufficient proof of the probative facts; and, second, if so, whether the fact in issue is deducible from them by an inference sufficiently strong to found a verdict.

§ 245. A strict metaphysical analysis shows that much of what is constantly received as direct evidence is really inferential. This is the case as to all evidence of identity; where the direct proof is, that certain characteristics known to belong to a certain person occur in the person identified, and the identity is an inference deduced from the coincidence, coupled with our experience that two persons seldom resemble each other so closely that accurate observation will not distinguish them (*a*). Accordingly, although every

(*a*) See on this, Reid on the Intellectual Powers, Essay vii, ch. 3, § 694.

man feels a moral certainty in identifying his own acquaintances, persons often confidently but erroneously infer identity in regard to strangers, from regarding points of coincidence and overlooking points of dissimilarity (*b*). In the same way, when I swear that certain letters were written to me by a friend or correspondent, the direct proof is that these letters and those of my friend possess the same characteristics of handwriting and style, that the subjects of the letters in issue are what usually occur in his correspondence, and that these letters are in sequence and connection with those addressed by me to him, and (as I presume) received by him only. From such circumstances I conclude with perfect confidence that the letters were written by my friend. I may be right as to the primary facts, yet my inference may be erroneous, owing either to an unusual number of coincidences occurring in the particular case, or to the letters in issue having been fabricated.

§ 246. In ordinary acceptation, however, evidence of this nature is not treated as indirect or inferential; but those facts which the witness may depone to, although embracing his inferences from more direct facts, are regarded as direct evidence, unless when they bear on the facts in issue through the medium of an inference. Evidence of identification and the like is therefore regarded as direct, unless when the witness states the points of similitude, and leaves to the jury to infer the identity.

§ 247. The terms "circumstantial" and "presumptive" evidence are often used synonymously. But in correct legal language they are different species of the genus "indirect" evidence. In this view, presumptive evidence consists of a single fact or a small group of facts, from which another fact is inferred, on account of the general experience of mankind having found them to be frequently coincident. In presumptive evidence, therefore, we arrive at the result not so much by reasoning out the inference applicable to the facts of the particular case, as by observing that that case comes within a category of cases, from which a certain inference is usually deducible (*c*). On the other hand, cases of circumstantial evidence cannot be thus generalised. Each one is individual and peculiar,

(*b*) Several instances of erroneous identification are collected *infra*, § 262.

(*c*) According to the view stated in the text, every case of presumptive proof may be reduced to a syllogism, of which the major premiss is, "Most A are B," *e.g.*, "Most persons holding bills are onerous creditors," or "Most persons having the possession of moveables are the proprietors of them." But cases of circumstantial evidence cannot be so resolved, because there are no categories of similar cases with which they can be classified.

and the result is obtained by a process of reasoning applied to the specific circumstances proved, independently of precedents. Such cases often embrace a number of presumptions, and require a balancing of conflicting probabilities; whereas, in a pure case of presumptive evidence the facts are simple, and the inference is recognised at once by all men of ordinary understanding (*d*).

(*d*) The distinction between circumstantial and presumptive evidence is well stated in 1 Starkie, 558.

TITLE VII.

OF CIRCUMSTANTIAL EVIDENCE.

§ 248. Having thus explained generally the nature of circumstantial evidence, we proceed to examine it in detail (*a*). There are few more important branches of law; for not only does evidence of this kind enter more or less into every judicial investigation, but farther, "most of the facts upon which courts of justice act, not only in civil but in criminal cases, even in those which affect the lives of individuals, are established by circumstantial proof" (*b*). It is essential to the well-being of society that crimes should not go unpunished merely because they have been committed in secret; and that civil rights should not be lost on account of there being no direct proof of the facts on which they depend. But if circumstantial evidence were not credible, no such views of expediency could entitle us to rely upon it. We do so because reason, experience, and the common assent of mankind prove its trustworthiness. It is not only our guide in the ordinary affairs of life; it is also the ground of our belief in the highest religious and scientific truths. The demonstrations of Butler, Paley, and Chalmers are different congeries of circumstantial proofs. So are the physical systems of Newton and Copernicus. Indeed there is not a science or branch of philosophy, mathematics alone excepted, which does not depend more or less on circumstantial evidence.

In treating of this subject with reference to judicial investiga-

(*a*) This subject is treated by Mr Burnett, 518, *et seq.*, and Mr Alison, vol. i, p. 74, 241, 445. In England it is the subject of an ample commentary by Mr Starkie, vol. i, p. 560, *et seq.*, 3d ed.; and of a work by Mr Wm. Wills. It is also treated of in Mill's Logic, B. iii, ch. 23—Benth. Jud. Ev., B. v.—and Menochiis *de presumptionibus;* and it is expounded by Chief-Justice Shaw in the trial of Dr Webster, reported separately by G. Bemis, 1850. (*b*) Per L. Wynford in Galbraith *v.* Galbraith, 1831, 5 W. S., 87.

tions, we shall first consider the principles of circumstantial evidence, and then analyse a few illustrative cases.

§ 249. All human acts and transactions are parts of a great tissue of circumstances spreading over the history and character of the individuals concerned, and reaching to the external world. Of all these circumstances none are independent or isolated; but each is united and intertwined by countless links and ties with its antecedents, its adjacents, and its consequents (*c*). Every day we meet some of these groups of circumstances, whose relative dependence and sequence we observe; and by reading and conversation we participate in similar experiences of other men. From these materials we form opinions as to the mutual contingency both of human actions and of material phenomena; and that not only in their outward manifestations, but even in their latent causes and results. We learn to discriminate more or less successfully between the essential and the accidental qualities of similar cases, and to trace the principles of combination in new groups of circumstances. Sometimes we know only certain members of the series, but from these we can ascertain those which are awanting.

§ 250. To discover the missing from the known facts—the *facta probanda* from the *facta probata*—is the province and object of circumstantial evidence. The result depends on the probability, sometimes amounting to moral certainty, of the coincidence between them, as compared with any coincidence of an opposite nature. The ground-work of the reasoning by which we decide the question is our belief in the permanence of the order of nature in the moral as well as the material world; for we find moral causes operating with almost as great uniformity as physical, although from the latency of mental operations, their slight and often ambiguous indications, and the countless diversities of individual characters, we are more apt to mistake them than material phenomena (*d*).

§ 251. The facts which circumstantial proof may embrace are innumerable, as are the occurrences in the course of nature and society, and the incidents of daily life. They may be classified into, 1st, Circumstances of a purely material nature; 2d, Those relating to men and the lower animals in their character of living beings; and, 3d, Mental phenomena, inferred (as they must always be) from external indications.

These classes of circumstances will be noticed in their order.

(*c*) From 1 Starkie, 560.

(*d*) From Wills on Circ. Ev., 10.

§ 252. I.—Opportunity to commit the offence must be the basis of every criminal charge. It embraces nearness in time and place to the scene, possession of the means by which it appears to have been committed, or of power to procure them, and the appropriateness of the means within the prisoner's reach, to produce their supposed effect. Sometimes possession of the individual instrument with which the crime was perpetrated is traced to the accused, and goes far to prove his guilt. An example of this occurred in a case of burglary in England, where one-half of a broken knife lay beside the opened window, which bore marks of the blade, and the other half precisely fitting it was found on the prisoner's person (*e*). In another case a witness swore that the broken piece of the key left in the forced lock was part of one which recently before he had made for the prisoner (*f*). In a case of murder, also, the wadding used in charging the gun was a piece of paper which precisely fitted another piece taken from the prisoner's pocket, so that they formed a printed ballad, the lines of which ran across the tear (*g*). In another case the bruised marks on the face of the assaulted person corresponded to the wards of a large key belonging to the prisoner, with which the blow was said to have been given. Sometimes the prisoner is brought to the scene of the crime by his shoes exactly fitting the bloody footprints on the floor, and on the clay or snow outside, the identification being complete owing to peculiar marks, *e.g.*, a patch on the sole put on with nails of a different size. Of the same nature is proof that the threads of the cut web found in the prisoner's possession, and those of the part left on the loom, correspond exactly when examined with a magnifying glass.

§ 253. In cases of murder, the existence of recent stains of blood on the prisoner's clothes is not of much weight by itself; because injuries which draw blood happen occasionally to every person, and the occupations of some people expose them daily to such accidents, or to stains from other bloody objects. But such marks may be important from the part of the prisoner's dress where they occur, and from their combination with other circumstances; as in a trial for murder where there were marks of blood and milk on the knee of the prisoner's trousers, and milk had been

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(*e*) 1 Starkie, 562.—See a similar case mentioned by Chief-Justice Shaw in Dr Webster's trial, separate report, p. 466. (*f*) Crowder, 1831, 1 Al., 318.

(*g*) R. *v.* Mountford, 1835, 1 Moo. C. C., 441, as noticed in Wills, 97—Benth. Jud. Ev., B. v., ch. 15—3 Hans. Parl. Deb., p. 1740 (3d Series), where Lord Eldon relates a similar case.

spilt on the floor where the body lay (*h*). Another physical circumstance of a criminating nature, and which occurs in daily practice, is possession of the stolen goods shortly after the theft. And in prosecution for coining, the prisoner's possession of a number of base coins of the same manufacture as the one libelled on, creates a high probability that it was either coined or uttered by him.

§ 254. Sometimes evidence of this character bears with absolute certainty an inference highly important to the cause;—as where writing of a certain pretended date appears on paper which is proved to be of a later manufacture; where the bullet with which a man was killed is too large to fit the pistol which some one had placed beside him to make believe that he had committed suicide (*i*); and where a ragged rusty knife covered with blood is in the dead man's hand, but the wound is smooth as if cut with a razor. So the inference that a crime had been committed by a certain person would be conclusive if it were proved that no one else was near the scene of it during the time within which it must have been perpetrated; while an *alibi* (which is seldom satisfactorily proved) necessarily infers innocence. In the trial of Courvoisier for murdering his master, Lord William Russell, certain marks appeared on a back door of the house, as if indicating that it had been broken open; but they did not show sufficient force for that purpose and they appeared to have been made from within, with a bent poker found in the prisoner's pantry. The only ways by which the house could be approached by the back, were over a wall covered with dust, which bore no marks of any one having been upon it, or over some tiling which was so old and frail that it would not have borne the weight of any person. These circumstances proved that the appearances of burglary were fabricated; and they were strong circumstances against the prisoner (*j*).

§ 255. But highly important as evidence of this nature is, considerable caution is required in estimating it. The conclusiveness of the inference up to a certain point tends to make us overlook the want of a sufficiently strong connection between that inference and the fact in issue.—A striking instance of this occurred in England in the trial of Isaac Looker for sending threatening letters, where the evidence of handwriting was contradictory, but the

(*h*) Scanlans, High Court of Justiciary, "Edinburgh Courant" Newspaper, 15th June 1852.—See also Richardson's case, noted *infra*, § 285. (*i*) A case of this kind happened at Liege in 1764; 3 Paris and Fonblanque Med. Jur., 34, 39.

(*j*) R. *v.* Courvoiser, 1840, Wills on Circ. Ev., 241.

paper on which the letter was written, and that of two other similar letters, and of a scrap of paper found in the prisoner's bureau corresponded exactly, their ragged edges fitting, and the water-mark of the maker's name, which had been in three parts, being complete when the pieces were placed together. On this proof the jury convicted the prisoner; and he was sentenced to transportation. The judge and jury having retired for a few minutes, the prisoner's son, a youth of about eighteen years of age, was brought up by the prisoner's attorney, and confessed the crime. He then wrote from memory the contents of the letter, which on comparison left almost no doubt of the truth of his statement, as it only differed a little from the very words of the original, and contained the same mistakes in spelling. The proof was completed by his making an exact duplicate of the document, on being requested to copy it in Court. Two days afterwards he was tried and convicted. It appeared that he had access to his father's bureau, which was commonly left open. On this case Mr Wills justly remarks that, considering that any one had access to the father's repository, the weight of the circumstance on which he was found guilty was overrated (*k*). The case of the pistol already referred to illustrates the same risk of error; for had the bullet fitted, the conclusion would have been drawn that the party had killed himself, unless there had been very strong circumstances of an opposite tendency. On this point it may be noticed that the water-mark of the year on paper is not to be relied upon; for it has repeatedly been proved that manufacturers issue paper marked of a date some months in advance, and sometimes use moulds of a very different date from the true one (*l*). The same may be said of the dates affixed to books; for example, Mr Napier's recent work on the law of prescription bears on the title page the year 1854, whereas it consists of two parts, the first of which was published fourteen years before, and the second in the beginning of November 1853.

§ 256. Circumstantial evidence of a physical character may also be fabricated; and the more simple the facts which infer the conclusion, the easier is the forgery (*m*). In this way Jacob was deceived into believing that Joseph had been killed; and the theft of Joseph's cup appeared to be brought home to Benjamin. So the circumstance of prints from the prisoner's shoes being found on the

(*k*) Wills' Circ. Evid., 141—R. *v.* Looker, Annual Reg., 1831, p. 9.

(*l*) See Rodger *v.* Kay, 1834, 12 S., 317—Miller *v.* Fraser, 1826, 4 S., 551—Wills, 29, 114. (*m*) A striking instance of this is noted *infra*, § 288.

scene may be delusive, owing to the real culprit having worn another person's shoes in order to divert suspicion from himself. This might easily happen where the true criminal is one of a number of men who lived together in a bothy or lodging house, so that he could probably find some fellow-lodger's shoes which would fit him. Two known instances have occurred in England (and there have probably been many more) (*n*), in which the real thief when pursued passed the stolen property to a stranger, who was thereupon erroneously convicted of the crime. The one was a case of horse stealing, for which the supposed thief was executed, and which the real culprit afterwards confessed (*o*). In the other (a case of cattle stealing) the innocent party was sentenced to transportation for life, but was pardoned in consequence of a representation of the circumstances. On being apprehended he had assumed a false name to conceal his situation from his friends (*p*). The possession may also have been the work of animals of secretive habits. In a French case a man was convicted of stealing several gold pieces; which had been found in his trunk. After his execution the real culprit was found to be a magpie, which had secreted the pieces there without his knowledge, by dropping them through a small hole in the lid (*q*).

§ 257. A striking instance of fabricated circumstantial evidence occurred in a trial for manslaughter in England, where a witness swore that the prisoner committed the deed with heavy blows from a bludgeon. On cross-examination he was requested by the prisoner's counsel to show with what amount of violence the blows had been given, when the stick flew into pieces on his striking it on the table. The consequence was a verdict of acquittal. But the secret history of the case was, that the weapon had been borrowed by the prisoner's attorney, and had been roasted in an oven. The error into which the prosecutor fell was allowing the risk of such a contingency, and failing to trace the history of the weapon. On account of such risks of tampering, the dishes, portions of the intestines, &c., which are supposed to contain traces of poison, should always be sealed up with great care, and put into a place of security, and before any experiments upon them begin, the seals should be carefully examined to show that they are entire.

(*n*) The author may be permitted to express the opinion, that juries are apt to infer guilt of theft from recent possession, without sufficiently corroborating circumstances.

(*o*) Sir M. Hale, Pleas of the Crown, vol. ii, ch. 39. (*p*) R. *v.* Gill, Annual Reg., 1827, Wills on Circumstantial Evid., 55. (*q*) Case mentioned in Benth. Ev., B. v, ch. 3, § 5, and in Dumont's edition of ib., p. 148.

§ 258. The object of these remarks is not to cast discredit on this branch of circumstantial proof, but to show its true value, and the propriety of suspending any judgment suggested by the circumstance when it stands alone. This is peculiarly the case where the circumstance is of a criminatory character. No doubt the bare possibility of the evidence having been fabricated by some person is not sufficient; yet if the prisoner's previous character, the statement he makes when apprehended, the opportunity for fabrication, and other circumstances, coincide with the idea of his innocence, he ought to be acquitted; while corroborating circumstances of an opposite tendency ought to lead to his conviction. It sometimes happens that the most anxious care in judge and jury does not result in a true verdict. But such errors are not confined to cases of circumstantial evidence. They are incident to all human judgments: and the only rule that can be given in such cases is, that wherever there is a reasonable doubt as to the conclusiveness of the proof, the verdict should be on the side of mercy.

§ 259. II.—Circumstantial proofs of the second class, namely, those relating to man and the lower animals in their character of living beings, are often important. For example, in every charge of a crime requiring violence it must be shown that the accused had sufficient strength to commit it. This is peculiarly necessary in those trials for rape where it is alleged that connection was obtained by force, as eminent medical jurists are of opinion that a healthy grown woman cannot be ravished by a man of ordinary strength, unless she has been stunned or terrified into submission. Many cases of supposed *alibi* (apart from mistakes as to identification and time), resolve into the question whether the prisoner, by running, riding, or travelling in some other way, could have been in both places within the time sworn to. Dick Turpin's famous ride illustrates this kind of inquiry (*r*).

§ 260. Again, in trials for murder, the direction of the cut or stab is often important; as where it had evidently been given by a left-handed person, and the accused has that peculiarity (*s*). In one case the mark of a bloody left hand on the left arm of one found dead, showed that some other person had been on the spot either at the time of the murder or shortly afterwards. The deceased had been found in bed with her throat cut; matters being arranged to indicate that she had destroyed herself. She had been murdered by persons who occupied the room adjoining, and forming

(*r*) See also the cases noted *infra*, § 285, 290.

(*s*) Richardson, 1786, Burnett, 524, *infra*, § 285.

the only access to her apartment (*t*). A remarkable case of this kind occurred where the body of a gentleman was found lying in a ditch near London, pierced completely through with his own sword; his gloves and some other things having been laid on a bank, to induce the belief that he had committed suicide. But there was no blood about the place, and none followed on drawing out the sword. The body was discoloured and bruised; and the neck was so flexible that the chin could be turned from one shoulder to the other. The man had been strangled (*u*).

§ 261. Questions of succession, parentage, and the like, sometimes depend on inferences from the course of nature in the animal kingdom. In the Douglas cause (*v*), for example, the strong likeness between the children and Sir John and Lady Stewart was dwelt upon by Lord Mansfield as an important fact in favour of the relationship; while Lord Camden noticed that the children were unlike the persons from whom it was averred they had been bought. Strong evidence of this kind was adduced in a criminal trial in a Circuit Court for child-murder, where the coincidence of the child having six toes, and of some members of the prisoner's family having the same conformation, went far to prove the maternity (*w*). So in an action of paternity brought by a woman of a white race against a man of the same colour, the defender, although he admitted having had connexion with the pursuer, was assoilzied, because the child was a mulatto (*x*).

§ 262. Cases of personal identity depend on a similar inference from the ordinary course of nature. But, while an accurate observer or an intimate acquaintance can almost always distinguish one person from another, remarkable cases of mistaken identity have occurred, in which individuals have been found to resemble each other much more closely than those who have not studied this subject would suppose (*y*). In such cases an identification

(*t*) R. *v.* Norkott and Okeman, 1629, 14 St. Tr., 1324. (*u*) 1 Starkie, 572.

(*v*) Douglas cause, 1769, 2 Pat. Ap. Ca., 144, 177—See *supra*, § 19.

(*w*) Laird, 1848, Arkl., 471. (*x*) Sinclair *v.* M'Arthur, 12th November 1812 (not rep.), Hume's Sess. Pap., Winter 1812-13, vol. i, No. 5, and noted in 2 Fraser, 8.

(*y*) Many instances of mistaken identity might be given. The following will suffice for illustration:—The personal resemblance between Page, a notorious highwayman, and Mr Frank Douglas, a man of fashion, was so strong, that one of some persons robbed swore positively that Mr Douglas was the man who committed the offence. Mr Douglas narrowly escaped conviction, and the mystery was afterwards explained on the apprehension of Page.—(Paris' Med. Jurisp., vol. i, p. 222, and vol. iii, p. 143; Gentleman's Magazine, vols. 27 and 28; Beck's Med. Jurisp., 408.) Baron Rolfe, in summing up the evidence in Rush's case (Separ. Rep., p. 88), stated that he remembered an in-

from moles, *naevi materni*, cicatrices, and other peculiar marks, is of the greatest importance; for although persons are sometimes

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stance of a man having been hanged on a mistaken identification. In 1797 two men were convicted and hanged for the murder of Mr Syder Fryer, a lady who was in company with the deceased at the time of the murder having positively sworn to the identity. Several years afterwards the murder was confessed by two men who were on the scaffold for other crimes.—(R. *v.* Clinch and Macklay, 3 Paris and Fonblanque, 144; Wills on Circ. Evid., 91.) A man identified as having committed a robbery proved an alibi from the Court books, which showed that at the very time of the offence he was on his trial for a similar crime, where he had also been mistaken for the real offender; case of Male, quoted (but with a wrong citation) in Benth. Ev., B. v, ch. 15, § 4, note. A person on whom a highway robbery had been committed swore positively that the prisoner committed the act. He was ordered out of Court, and in the interval another man, who awaited his trial on a capital charge, was placed beside the prisoner. The witness was then brought back, and solemnly charged to be careful as to his answer; when on looking at the dock, and seeing two persons so much alike, he became speechless and petrified with astonishment, and declined answering. The other man was tried and executed for a different crime, and, a few hours before his execution, he acknowledged that he had committed the robbery in question.—(3 Paris and Fonblanque, 143.) A most remarkable case on this head occurred before the Parliament of Toulouse in 1560. Martin Guerre had been absent from his home for the space of eight years. An adventurer named Arnauld Du Tilh, who resembled him, formed the design of taking his place, and actually succeeded so far as to be received by the wife of Martin as her husband, and to take possession of his property. Children were born to this union, and he lived three years in the family with four sisters and two brothers-in-law of Martin, without their suspecting his identity. It became, however, a subject of dispute. Several hundred witnesses were examined, and of these thirty or forty swore he was the real Martin Guerre; nearly the same number declared that he was Arnauld Du Tilh; while others deposed that the resemblance between the two men was so great that they could not decide whether the prisoner was an impostor or not. The perplexity of the judges on this occasion was very great; but in spite of many things that weakened his cause, they were on the point of deciding in favour of Arnauld, when the arrival of the true Martin developed the deceit. Even when confronted, the effrontery of Du Tilh was such as to lead many to doubt, until the brother and sisters of the absent person fully recognised him; Causes Celebres de Pitaval, vol. i, p. 1. The case is mentioned by Foderé (Med. Jur., vol. i, ch. 2), and Beck (Med. Jurisp., 405). Several other instances of mistakes in identity will be found in the books on Medical Jurisprudence, and in the Cyclopedia of Practical Medicine, art. *Identity*. From these instances it is evident that great caution is necessary in questions of identification; especially when the witness is not familiar with the appearance of the person he swears to. As Baron Rolfe remarked in his charge in Rush's case (1849, Sep. Rep., 88), "There is no sort of evidence that ought to be more cautiously received, or that is more often proved unfounded, than the identification of a person, where that person is a stranger." In criminal cases especially, a conviction should never be rested on such evidence without corroboration. Witnesses have sometimes sworn confidently to identification, where they had only seen the person in the light caused by the flash of a pistol. M. Gineau, Professor of Experimental Physics in the Imperial College of France, exposed the untrustworthiness of such proof by firing several primings of pistols in a dark room. The light produced was strong but fuliginous, and so rapidly extinguished

found who bear a strong personal resemblance, a farther coincidence in regard to such marks is in the highest degree improbable. In the trials of the Mannings (z) and Dr Webster the identification of the murdered persons was completed by the evidence of the dentists who had made their false teeth.

§ 263. Important circumstantial proof may be derived from personal habits. A detective officer, by pitching a nut into the lap of a person in woman's clothes, discovered the disguise, as the man brought his knees together instead of spreading out the dress to catch the nut, as a woman would have done. Pliny (a) mentions an instance of two slave boys who resembled each other closely being sold as twins; but the imposture was discovered from the one speaking a language of Asia, the other that of Transalpine Gaul. The same kind of evidence was used by a local judge in this country a few years ago, in a summary trial for stealing pigeons, which the culprits declared they had reared. The sheriff had the birds taken to a rising ground where they were allowed to escape. They immediately flew directly to the dovecot from which they had been stolen.

§ 264. The phenomena which indicate parturition (b), puberty, death (c), and survivorship (d), and indeed most matters falling under this class of circumstantial proofs, belong to the science of medical jurisprudence. They are so fully treated by the writers on that subject as not to require any detailed notice here. One striking case may be mentioned (as it is not to be found in the reports), where the suspicion that a woman had been poisoned arose from a dog having died suddenly, after licking up some stuff thrown out of a vessel into which she had vomited. This circumstance led to an investigation; which resulted in the trial, conviction, and execution of her husband for murdering her by arsenic (e).

§ 265. III.—As the state of mind in every sane man must

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that it was impossible to identify the person firing. (Causes Celebres par Mejan, vol. iv, p. 329; Beck, Med. Jurisp., 407.) Of as little value is identification by one whose faculties are obscured by age or disease. Jacob easily cheated Isaac into blessing him instead of Esau. In may be added, that the means of identification may be destroyed by many causes—as age, disease, distress. This subject is noticed by Beck, Foderé, and other writers on Medical Jurisprudence.

(z) *Infra*, § 283. (a) Pliny, Hist. Natur., lib. vii, ch. 12. Several cases of mistaken identity are collected by this author. (b) See this subject partly noticed *infra*, in treating of the presumption *pater est quem nuptiae demonstrant.*

(c) See *infra*, chapter on the presumption of life. (d) See *infra*, ib.

(e) Bennison, High Court of Justiciary, "Edinburgh Courant," 27th July 1850.

coincide with his conscious acts, circumstances indicating mental phenomena (being the third class of circumstantial proofs) are often of great importance. This is especially true in most criminal causes, where the illegal intention and motive is of the essence of the charge. Convincing evidence may also be derived from the manifestations of natural affection either in man or in the lower animals. When Solomon decided between the two mothers, he showed how simple and conclusive such proof might be. So in a question of dog-stealing, the animal's recognition of his master would be the best of all evidence. Mr Alison mentions a trial for theft by housebreaking, where the fact that a fierce watch-dog on the premises had not barked on the night when the house was entered, contributed to fix the crime upon one who had been a servant in the house, and was familiar with the animal (*f*). Almost as strong evidence sometimes flows from the second nature which habit forms; as in the case of deserters, who have been detected by their mechanical obedience to the sudden word of command.

But the circumstantial evidence of this nature adduced in Courts of law is seldom so simple or so satisfactory; and therefore it requires a more detailed examination.

§ 266. Commencing with evidence of motive, we observe that the commission of some crimes would gratify the passions of any man as well as of the accused. But many crimes can gratify only a few, perhaps only one man; and they are inexplicable without supposing the existence of a motive incident to the circumstances and character of some individual. Accordingly, while proof of a special motive is unnecessary and generally impossible in trials for theft, robbery, and rape, it is almost indispensable in trials for murder, wilful fireraising, perjury, and the like; for without it the conduct of the supposed criminal would want the coherence of a sane man's actions (*g*). No doubt there are cases where we are forced to believe that the prisoner is guilty, although we cannot discover or conceive any motive for his act. But such cases, which seldom occur in practice, leave room for a defence of insanity.

§ 267. Sometimes proof of one crime shows the motive to another. This has frequently occurred in compound charges of theft

(*f*) Young, 1828, 1 Al., 328. (*g*) But a special motive is sometimes proved in cases of the first class in theft of a key or of a box of little value, where the object is to obtain jewels, or a forged deed which the fabricator wishes to destroy. A remarkable case on this head occurred in the trial of Fraser, 1847, Arkley, 329, where the prisoner, in order to revenge himself on a certain man, had personified him one night, and in that character had connection with the man's wife. The prisoner was convicted.

or robbery and murder (*h*). In the trial of Leith for murdering his wife, and in several other cases, the prisoner's motive was to marry a woman with whom he had been carrying on an adulterous intercourse. The thirty murders of Burke and Hare were perpetrated in order to sell the bodies of their victims to Dr Knox. Murder has also sometimes been committed to get rid of a civil debt, as in the cases of Rush and Dr Webster. And the most common motive in crimes of wilful fireraising is to recover the sum insured (*i*).

§ 268. But while evidence of motive will give harmony and conclusiveness to a full circumstantial proof, it should be received with caution. The probability as to which one of a number of persons committed a certain crime, depends far less on the comparative advantages it would bring to each of them, than on their individual characters and circumstances. A murder which some men would commit for a florin, or to gratify national hate, has probably never for a moment entered the mind of the heir to whom it would bring a dukedom.

§ 269. Evidence that the motive has produced purpose or intention is much more important, but must also be examined with care. Mere threats often spring from temporary irritation without deep-rooted hostility. They indicate a rash and unguarded, rather than a determinedly malignant, character; and the very utterance of them, as every one well knows, tends to defeat their execution. The man who has resolved on a crime, is more apt to keep his purpose to himself, or to confide it to an associate under the seal of secrecy. Even the most wary, however, sometimes let their wicked purposes peep out accidently in the freedom of companionship, or the weakness of drunken confidence. When such unguarded hints, dark and apparently unmeaning at the time, coincide with the subsequent tokens of guilt, they are strong cords in the net of criminating evidence.

§ 270. The strongest proof of intention is preparation of the means for committing the crime. This, if done secretly, if the means would not suit any other purpose for which the person is likely to have procured them, or if a false purpose has been assigned for them, is the strongest of antecedent circumstances. It shows

(*h*) As in Courvoiser's case—case of the Mannings, *infra*, § 286.

(*i*) In the trial of William Smith, 12th April 1854, for the murder of William M'Donald, the alleged motive was to recover the proceeds of policies of insurance opened by him on M'Donald's life, on which he had not an insurable interest. This part of the case was proved, along with other circumstances of grave suspicion. The charge was found not proven.

not only deep-seated intention, but execution begun; so that if the crime has been committed with the instruments thus provided by the prisoner, it will not require a strong proof from other quarters to convict him. Sometimes the murderer's intention appears from his having thrown out false statements as to his victim's health, with the view of preparing the acquaintances for the catastrophe. And there have been cases where, in order to divert suspicion from himself, one has simulated kindness towards his intended victim.

§ 271. As opposed to evil motive and intention, is the previous good character of the accused, and his kindness, when not capricious or simulated, towards the person injured. Such circumstances, as they make guilt improbable *a priori*, are entitled to weight in exculpation. Yet it is a trite remark, that persons of unblemished reputation have committed the most heinous crimes; and that evil impulses and fits of moral aberration are found more or less in all mankind. Besides, the desire of preserving character and status is incident to the possession of them; and has prompted not only the most extensive forgeries and embezzlements, but even murders (*k*).

§ 272. With regard to all indications of intention, however, it will be observed that, although they raise an *a priori* probability that crime may be committed, and are most important when the commission of a crime by some person has been proved, they afford no proof of the crime itself. Such evidence ought never to be regarded, unless it be established that the crime to which the intention points has been perpetrated. It is also true that the means which the prisoner used for a certain purpose may have produced much more serious results than he designed; as, for example, where one intending only to hurt another gives him a mortal blow, or intending maliciously to burn articles within a house sets it on fire, or when medicines given to a woman without her knowledge to procure abortion cause death. In such cases it is not a sufficient ground for acquitting of the greater crime that the proved intention corresponded with a crime less aggravated; for, if the greater offence was the natural consequence of the means employed, the "reckless and corrupt disregard of the result constitutes the dole or malice, the depraved and wicked purpose" which the law holds to be essential to the greater crime (*l*). Accordingly the accused, in order to escape that consequence, must show not only that his intention was to commit the slighter offence, but that the means which he employed were only commensurate with such an intention.

(*k*) As in Richardson, 1786, Burnett, 524, *infra*—Dr Webster's case, Sep. report—Rush's case, Sep. report. (*l*) 1 Hume, 256, *et seq.*

§ 273. Some jurists have considered that in charges of the more aggravated crimes, their enormity is a reason for convicting on incomplete proof, under the old pernicious maxim, *in atrocissimis leviores conjecturae sufficiunt et licet judici jura transgredi.* With more reason in modern times the same circumstance is often pleaded in favour of the accused. Its proper bearing is well stated by Mr Starkie in these words: "When any doubt exists as to the *corpus delicti*, whether any crime has been committed, the very reverse of the above maxim is true; the more atrocious the nature of the crime is, the more repugnant it is to the common feelings of human nature, the more improbable it is that it has been perpetrated at all. But when it has once been clearly established that a heinous crime has been committed, and the only question is the perpetrator, it is manifest that the atrocity of the crime in the abstract raises no probability either for or against the accused, although under particular circumstances it may be a matter of great importance. Thus on a charge of infanticide, where there is a doubt whether the child was destroyed by design or by accident during a secret delivery, the very atrocity of the offence raises a strong degree of probability in favour of the latter conclusion. On the other hand, were it clear from the circumstance under which a body was found that the party had been murdered, then, the *corpus delicti* being established, the atrocity of the offence would in the abstract raise no probability either in favour or against any individual. But if, in the particular instance, the question were, whether the son of the deceased or a stranger was the guilty agent, then a probability from the particular circumstances would operate in favour of the son" (*m*).

§ 274. Considerable light is often derived from the correspondence or antagonism between the offence and the character or habits of the accused; as in skilful forgeries, and crimes which indicate daring or ingenuity, or which required acquaintance with the premises where they were committed, or with the habits of the person injured. Passing without remark from circumstances so obvious, a word or two may be said of the conduct of the accused person after the crime has been committed. Fear or attempts at flight on the part of one directly charged with a serious crime are of little weight as indications of guilt. Chief-Justice Shaw has well observed, in his charge to the jury in Dr Webster's trial for the murder of Dr Parkman, "Such are the various temperaments of men, and so rare

(*m*) 1 Starkie, 559, note. See also Benth. Ev., B. v, ch. 17—Wills on Circ. Ev., 157.

the occurrence of the sudden arrest of a person upon the charge of a crime so heinous, that who of us can say how an innocent or a guilty man ought or would be likely to act in such a case? or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, will always appear calm and collected? or that a guilty man, who by knowledge of his danger might be somewhat braced up for the consequences, would always appear agitated, or the reverse (*n*)?" The fearless composure of Mrs Manning (*o*) on her apprehension might have been mistaken for the effect of conscious innocence; as the flight of the accused in another case was one of the circumstances which led to his conviction and execution for a murder which it was afterwards proved he did not commit (*p*).

§ 275. Fear, however, will generally indicate guilt when it is prompted by some remark immaterial in itself, but latently connected with the circumstances of the crime. A striking instance of this occurred in a case where a marine serving on board a ship was apprehended on a charge of a murder which had been committed four years previously. Without any express allusions being made to the crime, he was asked where he had been about three years before, to which he answered that he had been employed in London as a day labourer. He was then asked where he had been employed that time four years, on which he immediately turned pale, and would have fainted had not water been administered to him. That so striking an effect should have followed from so simple a question, when the one preceding it produced no similar emotion, showed a secret cause of fear pointed to the date of the murder (*r*).

§ 276. In the same way falsehoods or equivocations by accused persons may be important when the facts to which they refer are only latently connected with the crime. If the connection is obvious, such circumstances afford little or no indication of criminality; for a man must have both candour and courage to make admissions which may subject him to the vexation, inconvenience, and risk of a criminal prosecution.

§ 277. Attempts to fabricate and suppress evidence and to

(*n*) Report by G. Bemis, p. 486. See this point fully discussed in Benth. Ev., B. v, ch. 8, *et seq.* (*o*) *Infra*, § 286. (*p*) Coleman's case, 1748, Wills, 68, 71; citing 1 Remarkable Trials, 162, 172, and 4 ib., 344. (*r*) Wills, 69; citing 6 Celebrated Trials, 19. The prisoner was tried and convicted.

subborn witnesses are much more forcible indications of guilt (*s*); for they show a consciousness that the undisguised truth is not consistent with the party's innocence. They also cause the rest of his evidence to be justly viewed with suspicion and distrust; *omnia presumuntur contra spoliatorem.* For the same reason attempts to destroy human remains—as in the cases of Dr Webster and the Mannings (*t*)—can seldom be explained on any hypothesis but that of murder. Yet some persons are so habituated to cunning and crooked ways, that they will rather call in the aid of falsehood, than leave truth and a righteous cause to their native strength. Such expedients, which are sometimes resorted to by a party's advisers or officious friends without his knowledge, are as dangerous as they are reprehensible (*u*).

§ 278. The general nature of the circumstances which compose this kind of proofs having been thus indicated, they will now be considered as they are found associated in practice.

Circumstantial evidence may produce every possible degree of conviction, from a mere turn in the balance of probabilities up to moral certitude. It often embraces facts which, viewed independently, raise slight and doubtful inferences; but which, when united, compel unhesitating belief. Indeed, it is the cumulative force of the whole circumstances, their mutual interlacing and consistency, and their unison in pointing to the same result, which constitute the characteristic value of this kind of evidence. The more numerous, therefore, the circumstances which lead to the same conclusion, and the wider the sphere in point of time, and space, and persons from which they are taken, the greater their united force becomes; as the more rays a lens can collect into one small focus, the greater their combined intensity. A case of circumstantial proof is often compared to a chain,—but not correctly, since a chain breaks if there is a single weak link. It is rather like a

(*s*) As in Donellan's case, reported by Gurney, p. 54—R. Donnell's case, 1817, reported by Fraser, p. 171—Wills, 73, *et seq.*—Courvoisier's case, 1840, narrated by Wills, 241. (*t*) *Infra*, § 286. Some cases of this kind are mentioned by Wills, 77, 165.

(*u*) See Burnett, 532—1 Starkie, 564—Wills, 82. In the Douglas cause the fabrication by Sir Jas. Stewart of letters from La Marre the surgeon put the right side of the case in the greatest jeopardy; see 2 Evan's Pothier, 337. And in a trial of a man in England for murdering his niece, one of the leading circumstances which led to his conviction and execution was, that being admonished to bring her forward at the next assizes, he produced another child, and the fraud was detected. The truth was, that the niece had fled from his house in consequence of some severe correction he had administered to her; Coke, Third Institutes, cap. 104.

"rope made up of many slender filaments twisted together; for it has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose" (*x*).

§ 279. Again, the strength of such a proof does not depend on the intrinsic importance of the component circumstances, or on the manifestness of the connection between a few broad facts and the result. Paley has well observed, that on the contrary, broad, obvious, and explicit agreements prove little, for they are easily forged; whereas, when some of the coincidences are minute, circuitous, or oblique, their very indirectness and subtilty gives them force, because they are farther removed from the risk of successful fabrication (*y*). The most convincing circumstantial proofs are those in which minute coincidences are united and interlaced with such as are obvious; the one set excluding risk of design, the other rivetting the whole proof to its appropriate inference.

§ 280. Much has been said as to the comparative value of direct and circumstantial evidence. That in the abstract direct evidence is superior cannot be disputed, for it involves only a question of belief, in which the risk of misdecision is limited to falsehood or error in the witnesses; whereas circumstantial evidence involves both belief and judgment, with the double risk of falsehood in the witnesses and error in the judge or jury. On the other hand, circumstantial proof is often far more trustworthy than direct, as the two occur in practice; for although false testimony or forged writings may pass undetected when they are limited to a few simple facts, it is almost impossible to fabricate successfully a complete case of circumstantial proof. Accordingly, direct evidence is preferable to circumstantial where the witnesses can be implicitly believed; whereas circumstantial evidence has the superiority in being more free from attempts at fabrication, and almost entirely beyond the risk of undetected concoction (*z*). Juries have often drawn this distinction by convicting on circumstantial evidence in the face of a direct proof of alibi sworn to by the prisoner's friends. No doubt circumstantial evidence has sometimes produced erroneous verdicts, followed by the extreme penalty of the law. But this

(*x*) Reid on the Intellectual Powers, Essay vii, ch. 3 (of Probable Reasoning). See *infra*, § 291, (4), as to circumstantial proof resembling a chain. (*y*) Horae Paulinae, ch. 1.—See also Whately's Rhetoric, part i, ch. 2, § 4. This is strikingly illustrated by the case noted *infra*, § 288. (*z*) On the comparative value of direct and circumstantial proof, see Benth. Jud. Ev., B. v, ch. 15, § 4 (vol. iii, p. 248, *et seq.*) —2 Hume, 385—Burnett, 523—Tait, 440—Bell's Law Dict., *voce* "Circumstantial Evidence"—Wills, 26, *et seq.*

may also be said of the least objectionable of all evidence, the deliberate and clearly proved confession of the accused (*a*); and there is good ground for believing, with the writer of an able and interesting treatise on this subject (*b*), that more mistaken sentences have followed upon false and mistaken direct testimony than upon erroneous inferences drawn from circumstantial evidence.

§ 281. With regard to the sufficiency of circumstantial proofs, there is manifestly a great difference between civil and criminal causes. In most civil trials, unless delict is involved, the competing parties are on an equal footing, and he ought to win who has the preponderance, however slight, of probabilities in his favour (*c*). But in criminal cases the verdict ought always to be on the side of mercy, unless the jury are perfectly satisfied of the prisoner's guilt. It is not enough that his guilt be a rational and probable inference, as well as the most probable of several inferences, from the circumstances. It must also be the only rational hypothesis which they will bear (*d*). The evidence must be so "clear, satisfactory, and conclusive, as to leave no rational doubt in the minds of the jury that the prisoner is guilty" (*e*). "What, then, is reasonable doubt?

(*a*) Cases noted in Wills, 63, *et seq.*—Taylor, 580, 1.—See the chapters on confessions, *infra*. (*b*) Wills, 246. (*c*) Even among purely civil cases there is a difference in the comparative sufficiency of circumstantial proofs. Lord Stair observes (4, 45, 9), "Every probability is not probative, nor deserves the name of presumption, and frequently many presumptions do concur to make up that probation; and there may be many opposite probabilities from different consequences and considerations, so that if the prevalence be not great it will not infer against a possessor the loss of his possession, much less against a proprietor the loss of his property; nor will it infer an obligation against a party that is otherwise free. But if the question be about attaining the possession of that which neither party possesses, but craves to recover as their prior possession, or if the point of right be dubious, the prevalence of the presumptions, though far less than in the former cases, may infer sufficient probation."

(*d*) In this way, as Mr Starkie observes (vol. i, p. 560, note), circumstantial proof is analogous to the *reductio ad absurdum* in geometry, the truth of the proposition being attained in each by disproving every other hypothesis; in the one to an absolute and mathematical, in the other to a moral certainty. In the geometrical proof, however, every possible hypothesis (and there are generally only two) may be known, whereas in the circumstantial proof the known hypothesis are much more numerous, and it is possible that some existing hypothesis has escaped observation. (*e*) Charge of Lord Justice-Clerk Boyle in Hunter and Others (Glasgow Cotton Spinners' case), 1838; Swinton's Report, 367. See also Lord Meadowbank's charge in the trial of Humphreys, where his Lordship observed (Swinton's Report, p. 353), "Should you doubt of the evidence being sufficient to bring the charges home to the prisoner, you have to give him the full benefit of that doubt. But to entitle you to do so, these doubts must be well considered, and the circumstances on which they are founded deliberately weighed. To doubts which are not reasonable you have no right whatsoever to yield. Your duty is to consider what is the rational and reasonable inference to be drawn from the whole

It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparision and consideration of all the evidence, leaves the minds of the jury in that condition, that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge" (*f*).

§ 282. It follows from these principles that if the evidence merely proves that the crime in issue was committed by one of a certain number of persons, without showing beyond a reasonable doubt which was the individual perpetrator, they ought all to be acquitted; for it is better that ninety-nine guilty should escape than that one innocent man should suffer. The counsel for the Mannings tried hard to bring the case for the prosecution to this dilemma; each of them admitting that the crime must have been committed by one or other of the prisoners, but urging that there was not proof to fix it on his client. The result, as often happens in such cases, was that both were convicted as joint perpetrators of the crime.

The application of the foregoing remarks will be best seen from a few illustrations.

§ 283. In the trial of John Downie and Alexander Milne for theft in 1824 (*g*), the facts were, that a carpenter's workshop in Aberdeen was broken into on a particular night and some workmen's tools were carried off from it. On the same night, the counting houses of Messrs Davidson at Foot-dee, and of Messrs Catto & Co., on the Links of Aberdeen, were also broken into, and goods and money to a considerable extent were stolen from them. The prisoners were met by two policemen at seven in the following morning in one of the streets of Aberdeen, at a distance from all of the places of depredation. Immediately on seeing the officers they began to run, and being pursued and taken, there was found

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circumstances; in short, whether it be possible to explain the circumstances upon grounds consistent with the innocence of the party, or whether, on the contrary, they do not necessarily lead to a result directly the reverse." In R. *v.* Hodges, 2 Lewins' C. C., 227, Mr Baron Alderson observed, that to enable the jury to bring in a verdict of guilty, it was necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. (*f*) Charge of Ch.-Just. Shaw in Dr Webster's case, Bemis' Report, p. 470. See also Burnett, 524—1 Starkie, 577—Wills, 149—Bell's Dict., *ut supra.*

(*g*) 1 Al., 313.

in the possession of each of them a considerable quantity of the articles taken from Catto & Co.'s house, but none of the things taken either from the carpenter's shop or from Davidson's. But in Catto & Co.'s warehouse were found a brown coat and other articles which had come from Davidson's, and which had not been there the previous evening when the shop was locked up; while in Davidson's premises were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto & Co.'s, the early hour when the panels had them in their hands, their attempt to escape, and their failure to account for their possession, proved that they were the depredators in that warehouse; the fact of the articles taken from Davidson's having been left there connected them with that prior housebreaking; while, again, the tools taken from the carpenter's shop, and found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The result was, that both the panels were convicted of all the thefts.

§ 284. A similar set of circumstances occurred in the trial of Charles Bowman in 1826 (*h*). This man was accused of no fewer than nine different acts of theft by housebreaking, committed in and around Aberdeen, at various times during the summer of 1825 and winter 1825–26. He had been living an industrious and apparently regular life as a carter, and no suspicion had been awakened against him until one occasion when, some of the stolen articles having been discovered in a broker's shop, and traced to him, his premises were searched, and some articles from all the houses broken open, along with an immense mass of other goods, evidently stolen, were found in a large chest, and concealed about various parts of the house. Their number, variety, and the places where they were found, were quite sufficient to convict him of reset; but, as they were discovered at the distance of many months from the times when the various thefts had been committed, the difficulty was how to prove he was the original depredator.

The charges selected for trial were five in number, connected with each other as nearly as possible in point of time. In none of them was the prisoner identified as the person who had broken into the houses, although the thief had been seen, and more than once fired at. But in all the first four houses which had been entered were discovered some of the articles taken from the others; and in

(*h*) 1 Al., 314.

the prisoner's custody were found some articles taken from them all, while three of the windows broken bore the marks of an instrument which coincided exactly with a chisel left in the last house. Two days after the housebreaking of that house, the owner's watch was shown by the prisoner to a shopkeeper in Old Meldrum, near Aberdeen, to whom he afterwards sold it.

It was thus manifest that the whole five housebreakings had been committed by the same person, and on a uniform plan. The hypothesis that the prisoner had received the goods from the thief without having either stolen them or known them to be stolen, was excluded by the number and nature of the goods and the places where they were secreted; while the possession of the watch, being sufficiently recent to infer theft of it, and the absence of any trace of one from whom the prisoner could have received the goods, excluded the idea that he was a resetter. The jury consequently found him guilty of all the five charges of housebreaking; and the Court (Lords Pitmilly and Alloway) approved of the verdict.

§ 285. In Autumn 1786, a young woman who lived with her parents in a remote district was one day left alone in the cottage, her parents having gone out to harvest-work. On their return home, a little after mid-day, they found her murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, her character, and the appearance of the wound, all concurred in excluding any idea of suicide, and making it certain that she had been murdered.

The *post-mortem* examination satisfied the medical witnesses that the wound had been inflicted by a sharp instrument held in the murderer's *left* hand. The deceased was also found to have been some months gone with child. On examining the ground about the cottage, there were discovered the footsteps seemingly of a person who had been running hastily from the cottage, and by an indirect road, through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person in his haste and confusion had slipped his foot and stept into the mire, by which he must have been wet nearly to the middle of the leg. There were discovered, also, along the track of the footsteps and at certain intervals, drops of blood; and on a small gateway near the cottage, and in the line of the footsteps, some marks as of a bloody hand. Not the slightest suspicion at this time attached to any particular person as the murderer; nor was it even suspected who might be the father of the child of which the girl was pregnant.

The concourse of persons at the funeral having afforded a good

opportunity for comparing their shoes with the footprints, an examination took place, during which the shoes of one young man were found to correspond exactly to the impressions in dimensions, shape of the foot, and form of the sole, which was newly mended and had large hobnails in a certain number and position, and fitting to the marks in the footprints. The lad, on being asked where he had been the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work; a statement which his master and fellow-servants, who were present, confirmed. As this went so far to remove suspicion, a warrant of committal was not then granted; but, some farther suspicious circumstances occurring a few days afterwards, he was apprehended.

On his examination he acknowledged that he was *left-handed;* and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before. But he adhered to his statement that he had been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided. His fellow-servants, however, recollected that on the forenoon of that day, when they were employed with the prisoner driving their master's carts near a certain wood, he said he must run to the smith's shop (which was on the way to the deceased's cottage), but would be back in a short time; and that he accordingly left his cart under their charge for that purpose. It was then proved that he had called at the smith's shop on the pretence of wanting something which it did not appear he had any occasion for; and a young girl, who happened to be about a hundred yards from the deceased's cottage, saw a person corresponding in appearance and dress to the prisoner, running hastily towards the cottage, but without having seen him return; from which it was probable he had gone on the other side of a small eminence, where the footsteps referred to were traced. The time when this person was seen by the girl corresponded with the time when the prisoner had been away from his fellow-servants. On his return, after an absence of half an hour (the time being fixed by one of the servants having looked at his watch), they remarked that he had been longer away than he said he would; to which he replied, that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle; on which they asked him where he had been. He answered he had stepped into a certain marsh; on which his fellow-servants observed, "that he must have been

either drunk or mad if he had stepped into that marsh," as there was a foot-path along the side of it. It appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them in the interval. It was then proved that the stockings he had worn that day had been found concealed in the thatch of the apartment where he slept, and appeared to be much soiled and to have some drops of blood on them. The blood he first accounted for by saying that his nose had been bleeding some days before; but on it being observed that he had worn other stockings on that day, he said that he had assisted at bleeding a horse when he wore these stockings. It was proved, however, that he had not assisted, but had stood on that occasion at such a distance that none of the blood could have reached him. The mud upon the stockings was also found on examination to correspond precisely with that adjoining to the cottage, and which was of a very peculiar kind, no other mud of the kind being found in the neighbourhood.

It then appeared that the prisoner had been acquainted with the deceased (who was considered to be weak in intellect), and had on one occasion been seen with her in a wood, in circumstances that led to suspicion that he had had criminal connection with her; and that on being gibed with having such intercourse with one in her situation, he seemed much ashamed and hurt. It was proved farther, by the person who sat next to him when the shoes were measuring, that he trembled much, and seemed a good deal agitated; and that, in the interval between that time and his being apprehended, he had been advised to fly, when his answer was, "where can I fly to."

On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on the coast, near to the dwelling of the deceased, and it was said that some of them might have committed the murder. But no conceivable motive could be discovered for their doing so, and there was no appearance of any of the cottages having been plundered. The jury by a great plurality of voices found the prisoner guilty. And in the interval before his execution, he confessed he committed the murder to hide his shame, knowing the girl was with child to him (*i*).

The only weak part of this case was in the proof of motive. But the suspicion of a criminal connection was sufficient to indicate

(*i*) Richardson, 1786, Burnett, 524.

one, and complete a circumstantial proof of a most conclusive character.

§ 286. An adequate motive was fully proved in the case of the Mannings; in which the rest of the evidence also was very conclusive.

On 17th August 1849, after Patrick O'Conner, a gauger in the customs, had been missing for several days, a body, identified as his, was found in a hole under the flags in the back-kitchen of a house in Bermondsey, naked, imbedded in lime, and having the legs bound back with strong cord to the haunches. The head and skull were frightfully mangled, the skull being not only fractured in sixteen places, but also showing a bullet hole, from which a ball was extracted. There could be no doubt that O'Conner had been murdered; and suspicion immediately fell on the persons who had occupied the house, one Manning and his wife, with whom the deceased had been on intimate terms, but who had suddenly disappeared three days before the body was discovered. They were both tried for the crime on 25th October 1849 (*k*).

From medical evidence it appeared that about a week had elapsed between death and the discovery of the remains; so that the investigation as to the immediate *res gestae* was narrowed to the 9th or 10th of August. O'Conner had left home as usual on the morning of the 9th; and at a few minutes after five on the afternoon of that day, he was seen about 150 yards from the Manning's house, and walking in that direction. That was the last occasion on which he was seen alive.

The criminal nature of the intimacy between the deceased and Mrs Manning was manifest; and there was good ground to believe that her husband was aware of it. She had been in the habit of visiting O'Conner in his lodgings, and remaining for a long time closeted with him; and on one of these occasions (the Friday nearly a week before the murder) they were heard conversing about railway scrip, Mrs Manning having consulted him as to what shares she ought to buy. She had opportunities on these occasions of knowing where he kept his cash, and scrip for railway shares, which he had to a large amount. She was aware that O'Conner possessed considerable funds; and her husband's knowledge of the same fact was proved; while one witness stated that Manning told him his wife knew that O'Conner had made a will in her favour.

(*k*) The following note of the case is taken from the "Times" of 26th and 27th October 1849.

It was then proved that a medical student who had lodged in the house for some time before the 28th July (when he left in consequence of the prisoners stating that they meant to go out of town), had repeatedly been spoken to by Manning about the effect of wounds in the head, and as to what part of the head a fatal blow could be struck, and about shooting with an air-gun. Manning had also asked him what kind of drugs would best produce stupefaction, or partial intoxication, so as to get a person to "put his hand to paper;" and this conversation had occurred immediately after Manning had been speaking about O'Conner, and his having considerable sums of money. The male prisoner had also, after seeing a wax figure of Rush at an exhibition, asked this witness whether a murderer would go to heaven.

On the 25th of July the male prisoner ordered a crowbar and a quantity of lime, and when asked whether he wished grey or white lime, answered, he wished the kind which would burn quickest. The lime was delivered at the house on the same day; the crowbar was sent on the 28th; and both were received by Mrs Manning, who complained that the bar was a shilling dearer than the price agreed on. Manning had met the boy with it on the street, and challenged him for carrying it without a cover, as he did not wish anybody to see what he was purchasing; and Manning accordingly went into a stationer's shop and bought brown paper, in which he wrapped it up. On the 8th of August the female prisoner bought a shovel, saying to the shopkeeper that she wished a strong one; and it was sent home the same day. The fractures in the skull corresponded with blows from the crowbar, and a shovel was required for laying in the lime. These different articles (only one of which, the shovel, could be required for any household purpose) were thus all prepared within a short time before the murder, both prisoners having been concerned jointly in purchasing them. There was no proof as to the pistol and bullet; but some gunpowder and tissue paper were found in Manning's coat pocket.

It was next proved, that on the 8th Mrs Manning wrote to O'Conner a note in affectionate terms, asking him to dine with them that day; but it was posted so late that he did not receive it in time to dine with them on the 8th. He was in the house for some hours in the later part of the evening; and on the 9th he had shewn the invitation to some friends, and had been seen close to the house immediately before the dinner hour (half-past five), as already mentioned. What happened in the house was not divulged; but on the evening of the 9th, about a quarter after six o'clock, Mrs Man-

ning was in O'Conner's lodgings, where she remained about three quarters of an hour, and then left, taking a parcel with her. She repeated her visit a little later on the evening of the 10th; and on leaving, was observed by the persons in the house to be pale, and to tremble very much. On the 12th, when some friends of O'Conner called at her house to inquire about him, she observed, without anything having been said to lead to such a remark, "Poor Mr O'Conner! he was the best friend I had in London." On this occasion her countenance was observed to change; whereupon the witnesses inquired if she was unwell.

It was farther proved that the Mannings had, on the 13th, sold all their furniture to a broker, both of them having been engaged in the treaty for the sale, which commenced several days before the supposed date of the murder.

On the 13th and 14th they left London. The female prisoner had her luggage ticketed "Mrs Smith, passenger, Paris;" and she was found some days afterwards in lodgings near Edinburgh, under the name of Smith. One of her parcels, left at the London terminus of the railway, ticketed "Mrs Smith, passenger, Paris, to lie till called for," was found to contain dresses marked with blood; and a dress among those sold to the broker bore similar marks. Mrs Manning's retreat was discovered in consequence of her having offered to sell railway scrip to a stranger; and a considerable quantity of scrip, identified as O'Conner's, along with money and bank notes, was found in her trunk, after she had denied having any scrip.

The male prisoner was found in Jersey. The day before leaving London he told the broker's servant, that if he was inquired after she was to say she had not seen him for a fortnight. The same day, on being asked by the broker if he was to sleep in his own house that night, he said he would not do so for twenty pounds. On his apprehension, he at once threw the whole blame on his wife, and described how she had fired the pistol at the back of O'Conner's head; but he gave no explanation on being asked about the fractures in the skull. It was also proved, that after the murder he had sold some scrip for £110 to a broker, when he represented himself to be O'Conner; and that a bank note for £100 (being part of the price) had been cashed at a bank, and bore his own signature.

From this circumstantial proof it was unquestionable that O'Conner had been murdered in the Mannings' house; and the only question was, whether the guilt of both prisoners was clearly

proved, or whether one of them might not have done the deed, without the other having been a principal or accessory before the fact? Manning's conversation with the medical student, his ordering the lime and crowbar, his anxiety to have the latter concealed, and his statement that his wife committed the act in his presence, without his interference, while he did not try to explain the fractures on the skull, more especially implicated him; while her receiving the lime and crowbar, ordering the shovel, writing the note to O'Conner, and going to his house the very evening of the murder, the bloody marks on her dress, and her manner on the occasions above noticed, more particularly inferred her complicity. These circumstances, with the joint arrangements for sale of the furniture and flight, and the division of the booty, showed that the murder and robbery had been a pre-arranged scheme, carried out by the prisoners jointly.

The jury had no difficulty in finding them both guilty; a verdict in the justice of which the whole country agreed with them.

§ 287. In the trial of Burke and Macdougal for the murder of the old woman Docherty (*l*), the circumstantial evidence was corroborated by the testimony of Hare, a *socius criminis*. No doubt could be entertained of Burke's guilt, and the jury accordingly found him guilty. The proof against Macdougal showed that she lived in the house with Burke as his wife, and had been there the previous evening when the old woman was brought in, that she was in bed in the room immediately before the murder, but that when Burke and Hare commenced the attack, she (along with Hare's wife) left the room and staid outside the door for a quarter of an hour till all was over. Her knowledge that Burke intended to murder the woman was proved; and she went along with Burke and the Hares part of the way when the body was taken to the dissecting room by a porter. It was highly probable, therefore, that she knew the murder was about to be committed, and remained outside to prevent any stranger entering. Yet there was a reasonable ground for doubting whether she had been thus assisting, or whether on the contrary she had been merely passive in not interfering to prevent the murder committed by her husband. The jury took the more merciful view and found the case against her "not proven." But Mr Alison (*m*) mentions that the opinion on the bench was that both prisoners were guilty.

(*l*) 24th Dec. 1828, Syme, 845, and separate report.

(*m*) 1 Al., 75.

§ 288. The compiler of the *Causes Celebres* mentions a curious case of successful fabrication of circumstantial proof, but without vouching for its authenticity (*n*). An old widow kept a small shop in a street in Paris, with a small back room where she slept. It was believed in the neighbourhood that she had amassed a great deal of money. Her only servant for a long time had been a boy who slept on the fourth storey of a tenement near his mistress's house, but not communicating with it. In order to get to his sleeping place he had therefore to go round by the street; and when he went home at night, he locked the outer door of the shop, and took the key, of which he had the sole charge and possession. One morning the neighbours were alarmed by finding the shop door open earlier than usual, without any movement being observed inside to indicate that the old woman or the boy had risen. No mark of violence was seen on the door. On the neighbours entering they found a bloody sword on the floor of the shop, and the woman lying in bed killed with thrusts of the weapon, one hand clutching a bunch of hair and the other a cravat. Near the bed was found a box which had been broken open. The shop-boy was seised. It was found that the sword and cravat belonged to him, and that the bunch of hair corresponded with his. In his room was found the key of the door, the only means by which the shop could have been entered without violence. On these circumstances being ascertained the lad was subjected to the "question": under the agonies of torture he confessed: and he was broken on the wheel. Not long afterwards a tavern-boy, who was arrested for some other crime, confessed in his dying declaration, that he alone had been the murderer. The tavern where he served adjoined the old widow's house. He was intimate with the shop-boy; and had been in the habit of putting up the boy's hair *en queue*, and in this way had gathered from the comb a quantity of hair, out of which he gradually formed the bunch grasped in the dead woman's hand. He had no difficulty in getting one of the cravats and the sword of his companion, and of taking an impression off the door key so as to have a false one made.

The circumstantial evidence against the shop-boy (supposing the case to be authentic) was probably so convincing that a jury would have found him guilty. But it presents this peculiarity, that the whole of the real evidence was of that apparent and manifest character which admitted of easy fabrication; while it wanted

(n) The case is quoted on the authority of Jeremy Bentham (Jud. Ev., B. iii, ch. 15 note *apud fin.*), whose reference to the *Causes Celebres* (vol. 5, p. 488) is inaccurate.

those minute and casual coincidences which almost always occur in real life. This manifestness could not have escaped the attention of the shop-boy, if he had committed the act; and it was difficult to believe that he would have left such glaring proofs behind him, when he had time and opportunity to remove them all. Perhaps the proof would not have been considered complete without the confession—a striking illustration of the worthlessness of confessions extorted under that most wicked practice.

§ 289. Contrasted with the case last mentioned is that of Humphreys, the rejected claimant of the Stirling Peerage (*o*). The earldom had been dormant for a number of years; when Mr Humphreys, who in early life had been a schoolmaster in England, and bore an unblemished reputation, came to this country and took steps to establish his pretended right to it. He produced a copious and elaborate set of title-deeds and other documents, which, if genuine, would have proved his pedigree; and by the usual form of an *ex parte* inquest he was in 1831 served heir to the last earl. He claimed to vote at the election of Scottish representative peers; and raised certain actions against the proprietors in possession of lands alleged to belong to the earldom. In 1833 an action was raised in the Court of Session at the instance of the Officers of State, to have the service and subsequent title-deeds set aside, as fabricated; and in that case the Lord Ordinary, after a good deal of investigation into the authenticity of the documents founded on by Humphreys, came to the opinion that the fabrication had been established, and in 1836 his Lordship pronounced an interlocutor reducing the services. Mr Humphreys was thereupon prosecuted before the High Court of Justiciary for forgery and uttering.

The documents extended over two centuries, and embraced a great number of writings, some of which referred to persons known to history. It was a minute analysis of these documents, and especially of their dates, which proved that nearly the whole had been forged, but with an astonishing amount of skill and elaborateness.

One document, bearing to be an ancient extract from the Chancery Office of a crown-charter, and having the dingy hue of genuine old age, consisted of several leaves stitched together. But the portion which the stitching covered was uniform in colour with the rest of the deed; whereas, if the document had been genuine, there would have been a marked difference in colour between the exposed

(*o*) Separately reported by Mr Swinton.

and the covered portions.—The same document had certain red marginal lines drawn on it. But official persons, familiar with the extracts of the period, swore that red lines were not introduced into the Chancery Office till a much later date. Some technical mistakes in the deed were also detected by skilful conveyancers.

This extract bore that the original charter had been sealed on 7th December 1639, and attested by "John (Spottiswood) Archbishop of St Andrews, our chancellor;" who had demitted that office thirteen months before the date referred to.

But the most conclusive as well as interesting circumstances regarded a print of a French map of Canada by "Delisle, premier Geographe du Roi, avec privilege pour vignt ans **1703**." On the back of this map were certain signed memoranda and narratives, dated in 1706 and 1707, which had been founded on as establishing the authenticity of the extract charter. The map naturally formed part of the claimant's muniments; as the Earls of Stirling had a grant of lands in Nova Scotia; and it was also not extraordinary to find on the back of it the writings referred to. It was proved, however, that Delisle had not been appointed Geographer Royal until August **1718**; and that it was the practice of engravers, and in particular of Delisle, to preserve their plates marked with the original year of publication (from which the copyrights ran), making alterations on them as they thought fit from time to time. The original issue of impressions in 1703 (of which several were produced) bore simply Delisle's name; but the particular impression in question could not have been issued until after 1718 when he acquired his patent of office. The necessary consequence was that the dates 1706 and 1707 of the writings on the back of it were false. To make the proof of fabrication still more convincing (if that were possible), it was proved that Fletcher, Bishop of Nismes, the pretended writer of one of the notes dated 1707, had died in 1711, that is, seven years before the publication of the paper on which it was indorsed.

A striking circumstance connected with the series of documents was, that repeatedly during the investigations in the civil Court, when a *hiatus* occurred in the proof, it was filled up by some additional documents discovered in the interval before the cause proceeded farther.

The forgery of the pedigree and series of titles was thus completely established; but the jury not being satisfied that Humphreys had uttered them in the knowledge of their character, returned a verdict of "not proven" as to that part of the charge, and

he was accordingly assoilzied. From the erudite nature of the fabrication and the acquaintance with the technicalities of Scotch conveyancing which it exhibited, as well as the skilfulness of the manipulation displayed throughout the writings, it was manifest that they had not been executed by Humphreys himself; while the fact that they had been considered authentic by his legal advisers in the civil case, and his previous good character, left in the minds of the jury a reasonable doubt of his having uttered them knowing that they were forged.

§ 290. These citations will be closed with the case of the Count de Morangiès (*p*); which illustrates the superiority of credible circumstantial proof, when conflicting with direct proof of a questionable character. The Count, requiring to borrow money to the amount of 300,000 livres, trusted an obscure money-broker, and through her a pretended money-lender, with bills of his, to that amount and upwards, payable to order. The pretended lender demanded payment of the whole. But the Count declared that only 1,200 livres had been delivered to him. The lender's case consisted of the bills, and the evidence of three alleged eye-witnesses to the delivery of the whole. On the side of the Count it was proved that the distance between his house and the lender's was such that it was impossible that any one person could have traversed it thirteen times with the different parcels of money within six hours, as the lender's witnesses declared had been done; while the history of the money-lender's life, traced from the date of the pretended acquisition of so large a fortune to the time of the transaction, showed the fact of her having possessed it, or nearly so large a sum, to be in a high degree improbable upon any proof, and quite incredible upon the evidence adduced. The Count's proof being upon matters within the lender's own knowledge, it was likely she could have disproved it, if it had been false. The Count was assoilzied.

§ 291. The foregoing commentary will have shown that the *rationale* of circumstantial evidence cannot be reduced to systematic propositions. Some general rules, however, may be evolved from it (*r*).

1. Every one of the circumstances essential to the conclusion should be established by its own appropriate and independent proof;

(*p*) Bentham Jud. Ev., B. v, ch. 18, sect. 5; citing Linguit's Plaidovers.

(*r*) See Benth., B. v, ch. 15, § 1—1 Starkie, 571, *et seq.*—Wills, 135, *et seq.*

in other words, the superstructure of theory should only be raised on a foundation of undoubted facts (*s*).

This rule applies with peculiar force to proof of the *corpus delicti*, the fact that the crime in question has been committed by some person (*t*).

2. The probative value of a number of apt circumstances increases in proportion to the number of independent sources from which they are derived (*u*).

When any concatenation of circumstances is consistently detailed by a single witness, the coherence of his narrative is intrinsic evidence of its credibility. When the different circumstances of the group come from a number of independent sources, their mutual coherence renders them in the highest degree credible, and the chance of misdecision is limited to the inferences deducible from them.

3. When each of the probative facts contributes immediately its own inference to the common conclusion, their compound strength

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(*s*) Baron Alderson has justly observed (R. *v.* Hodges, 2 Lewins, C. C., 227), "The mind is apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely is it, in considering such matters, to overreach and mislead itself, to supply some little link that is awanting, to take for granted some fact consistent with its previous theories, and necessary to render them complete." (*t*) Several melancholy instances have occurred of persons being executed for murders, where the supposed sufferer had not been killed by any one. See them collected in Wills' Circ. Ev., 162. Such cases show that the mere fact of a person having gone amissing, combined with proof of murderous intent in the accused, is not sufficient ground for concluding that the person has been murdered. On the other hand, it is not always indispensable that the body be recovered; otherwise there would be impunity for murders committed at sea (see Burnett, 536—Captain Green's case, March 1705). Accordingly, in an English case, a witness swore that a mariner had proposed to kill his captain, that during the night the witness was alarmed by noise of violence, and upon going on deck saw the mariner throw the body of the captain overboard, and it was also proved that near the spot a billet of wood was found with which a fatal blow might have been given, and that the deck and part of the prisoner's dress were stained with blood. It was urged on behalf of the prisoner, that as the captain's body had not been seen, he might have been picked up alive by one of the numerous vessels near the place. But the Court left the jury to say whether he had not been killed before being thrown overboard; and as they were satisfied that he had, they returned a verdict of guilty, which was followed by the prisoner's execution (R. *v.* Marsh, 1792, 2 Leach, C. C., 571). It is humbly thought that the judge's charge limited too much the question before the jury, since they might have returned a verdict of guilty although they had not been satisfied of the fact of death before the casting overboard, if they were morally certain that the murder was completed by the violence and that act in combination. (*u*) The increase may be better represented by a mathematical than a merely arithmetical progression.

is multiplied (*x*) as their number is increased; and they may jointly establish the fact in issue, although all of them, when viewed independently, may be explicable upon other hypotheses.

4. When the proof of each of a series of facts raises an inference of the existence of another fact in the series—only the last of them inferring the existence of the fact in issue—the probability of the truth of the issue (in so far as it depends on that line of evidence) diminishes as the number of the facts increase, and the inconclusiveness of any one inference in the series is fatal to the whole.

In this sense a circumstantial proof is like a chain, which cannot be stronger than its weakest link, and which becomes continually weaker as each new link is added, till it breaks with its own weight (*y*).

5. The existence of a single probative fact absolutely incompatible with a hypothesis deducible from all the other probative facts necessarily excludes that hypothesis; for, as the whole of the actual facts must have been consistent, some other hypothesis must exist, with which all the probative facts will coincide.

6. When the inconsistency between any of the probative facts and the hypothesis deducible from the rest of these facts is not absolute but probable, the conclusiveness of that hypothesis is diminished in proportion to the strength of the contrary probability. In criminal trials, therefore, the prisoner ought to be acquitted if the inference of guilt, when weighed against the supposed inconsistency, is not sufficiently convincing to exclude all reasonable doubt.

7. The conclusiveness of a circumstantial proof is not a sufficient reason for non-production of attainable direct evidence; and, as a party is not likely to trust the decision of his case to an inference, when he could prove it directly, the withholding of the testi-

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(*x*) "Probable proofs by being added, not only increase the evidence, but multiply it." Butler's Analogy (Fitzgerald's edition), 285—See also Mill's Logic, B. iii, ch. 23, § 6. Thus (to take the simplest case), suppose the probability of the truth of the inference that A is B to be as two to three, and the probability of the truth of another inference that C is B to be as three to four; "of every twelve things which are A, all except four are B by the supposition; and if the whole twelve, and consequently these four, have the characters of C likewise, three more will be B on that ground. Therefore out of twelve which are both A and C, eleven are B." Mills, *ut supra*—See also 1 Starkie, 569, note. (*y*) See this fully illustrated in Bentham, B. v, ch. 15, § 1, note—See also Mill's Logic, *supra*. Mr Mill justly observes, "a hearsay of a hearsay, or an argument from presumptive evidence, depending not upon immediate marks, but upon marks of marks, is worthless at a very few removes from the first stage."

mony of eye-witnesses impairs the probative value of a merely circumstantial proof adduced by him.

Lastly. In general the affirmance of the issue should not be left to direct proof alone, when corroborating circumstances are attainable. Accordingly, unmixed direct proof almost never occurs in practice, except when it is limited to the writ or oath on reference of the adducer's opponent.[1]

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[1] It has been thought unnecessary to multiply cases on this subject. The trials in Scotland which, since the publication of the first edition of this work, have excited greatest interest and attention, are those of H. M. Advocate *v.* Madeline Smith, in 1857 (Special Report by Mr Irvine), and H. M. Advocate *v.* Jessie M'Intosh or M'Lachlan, in September 1862; but neither of these cases presented specialties involving any important illustrations of the principles of circumstantial evidence, or requiring detailed analysis.

TITLE VIII.

OF PRESUMPTIONS.

CHAPTER I.—OF THE GENERAL NATURE OF PRESUMPTIVE EVIDENCE.

§ 292. A presumption is an inference as to the existence of one fact, drawn from the existence of another fact, and manifest to most persons of ordinary intelligence (*a*).

The principle of all presumptions, therefore, is, that whenever we have come to regard two facts as associated in coincidence or in sequence, proof of the existence of the one leads, more or less forcibly, to belief in the existence of the other. Hence presumptions may be classified either according to the grounds of the connection between the facts proved and the facts presumed, or according to the degrees of their probative force. A cursory glance will be taken at these general aspects of presumptions before noticing them individually.

(*a*) Stair, 4, 45, 9—Ersk., 4, 2, 34—1 Starkie, 558. The difference between circumstantial and presumptive evidence has already been noticed (§ 247). A *fictio juris* differs from them both. It exists where law, disregarding evidence and probability, holds as true what may be untrue, or what cannot possibly be true (Ersk., 4, 2, 38). Thus summonses narrate a complaint to the Sovereign by the real party, which might be true, but is always false; while the rules that the Sovereign cannot do wrong, that an heir is *eadem persona cum defuncto*, and that the person of a wife is sunk in that of her husband, are examples of impossible fictions. Sometimes a presumption runs into a fiction, as does the presumption *patrem esse quem nuptiae demonstrant* in England, whenever the birth was so recently after the marriage that conception in wedlock was impossible. The nature of a *fictio juris* was much discussed in Kerr *v.* Martin, 1840, 2 D., 752, which involved the question whether the fiction that the parents of children legitimated *per subsequens matrimonium* were married at the birth, applies in Scotland. The Court held that it does not.[1]

[1] The judgment was, that a child born out of wedlock was legitimated by the subse-

§ 293. (1) An inference is sometimes drawn as from cause to effect. Thus it is presumed that bribery in a witness will produce false testimony, and facility is presumed to arise from being on deathbed. More frequently the inference is from a proved effect to a latent cause or motive, *e.g.*, the presumptions that a child born in wedlock was begotten by the mother's husband; that one who pays interest owes the principal; that libellous expressions have been dictated by malice; and that deeds vitiated *in substantialibus* have been wrongfully altered after subscription (*b*).

(2) It is presumed that relations which have once existed have continued (*c*). Thus it is not necessary to prove the continuance or renewal of a general mandate. The relation of debtor and creditor is presumed to subsist till a discharge is proved, or till the presumption is overcome by a contrary inference arising from *mora* or some other relevant circumstance.

(3) Where acts are proved which indicate a certain chain or stream of events, subsequent acts in the series will be presumed (*d*). But this is a weak inference, since the hypothesis of the earlier acts having been so connected may be erroneous; while altered intention, accident and many other circumstances may have prevented their completion.—More forcible are presumptions from the later to the earlier acts in the supposed series (*e*), as in questions of prescriptive right, where, upon proof of possession during the memory of man, possession is presumed upwards to the date of the title.[2] So the existence of a decree is, after an interval, a sufficient reason for presuming the existence of its grounds and warrants.—Again, the intermediate acts in a supposed series will be presumed when the extremes are proved; *probatis extremis presumuntur media* (*f*). This is illustrated in proving possession, where it is enough to show

(*b*) Stair, 4, 45, 17, (4)—ib., 4, 42, 19, (2). (*c*) Best on Presumptions, 186. (*d*) 3 Benth, 213—Best, 75. (*e*) Benth, 213—Best, 75. (*f*) Stair, 4, 40, 20—ib., 4, 45, 17, (22)—Best, 75.

quent marriage of its parents, and was its father's heir, although a lawful marriage between its mother and another man had intervened. Six of the judges held that legitimation *per subsequens matrimonium* depended on the fiction that the father and mother of the child were married at its birth, that this fiction was contradicted by the intervening marriage, and that the child was therefore illegitimate. The majority thought that the rule, that a child born out of wedlock was legitimated *per subsequens matrimonium*, was a positive rule of law, not depending on fiction, and that therefore the child was legitimate.

[2] For example—If it be proved that the public have had uninterrupted possession of a right of way for a long period of years, though fewer than forty, a jury is warranted in presuming, if there be no evidence to the contrary, that they had similar possession

acts of possession at intervals of time ; from which law presumes that the possession continued throughout the whole period embraced by the proof (*g*).

(4) Law presumes that the ordinary course of nature has run (*h*). This is seen in the presumptions regarding the period of gestation (*i*), the duration of life (*k*), and the like. So it is presumed that a pupil is unable to contract, and that a girl below the age of puberty cannot consent to sexual intercourse.

(5) Similar to the presumptions last noticed, but less forcible, are those which flow from the ordinary course of human conduct (*l*); some of which, indeed, spring from the laws of nature. The course of trade and business give rise to an analogous class of inferences (*m*) ; *e.g.*, that bills are onerous, that *chirographum apud debitorem repertum presumitur solutum*, and the presumption from the *apocha trium annorum*.[3]

(6) Another principle in presumptions is, that where one side of the issue is injurious to a party, law will hold the other as true till it be disproved. This is shown in the presumptions in favour of innocence, sanity,[4] and legitimacy, and of freedom from conventional obligations and from servitudes (*n*). So all possession is

(*g*) Stair, *supra*. (*h*) Best, 170. (*i*) See *infra*, § 314, *et seq.*
(*k*) *Infra*, § 299, *et seq.* (*l*) Best, 170, 179. (*m*) Best, 179.
(*n*) Stair, 4, 45, 17, (2, 3, 5)—Ib., 4, 42, 21, (3).

before the date to which the proof goes back. But there is no room for that presumption, if there be proof that immediately prior to the date to which the proof of possession by the public goes back, there was adverse possession; Harvie *v.* Rogers, 3 W. and S., 251—Magistrates of Elgin *v.* Robertson, 1862, 24 D., 301. So in actions of filiation it is a general principle that, when the defender admits connection with the mother within the period of gestation, and if it be proved that he had opportunity of connection at or about the time of conception, connection at that time may be presumed; Lawson *v.* Eddie, 1861, 23 D., 876.

[3] A sale of goods is, if there be no special agreement, presumed to be for ready money. This presumption was applied to a case where the goods could only be delivered by parcels at intervals of time, to the effect of holding that a partial payment was due on each partial delivery ; Hall & Sons *v.* Scott, 1860, 22 D., 413.

Professional employment is *prima facie* on the footing that the professional services are to be remunerated, but circumstances may rebut the presumption ; Manson *v.* Baillie, 1855—2 Macqueen, 80, 81, *per* Lord Chancellor Cranworth. In a previous case, Lord Rutherfurd held that an allegation that an agent had agreed to give his services gratuitously, could be proved only by the agent's writ or oath; and his Lordship's interlocutor was affirmed; Taylor *v.* Forbes, 1853; reported 24 D., 19. But see Knox *v.* M'Caull, 1861, 24 D., 16.

[4] Sutton *v.* Sadler, 1857, 3 Scott's C. B. N. S., 87.

presumed to be lawful (*o*)[5]; and *omnia presumenda solenniter acta* (*p*).[6]

All presumptions fix the party against whom they are pleaded with the burden of proof. They have already been noticed with reference to that subject (*q*).

§ 294. In a legal point of view, the most important division of presumptions is according to their degrees of probative force (*r*). In this respect they are divided into *presumptiones juris et de jure*—*presumptiones juris tantum*—and *presumptiones hominis vel judicis*(*s*). The first class are presumptions to which law gives effect absolutely, and which may not be contradicted by any evidence, however strong and clear (*t*). In some cases the conclusiveness of these inferences arises from their natural strength; but it is often an adventitious quality which law attaches to them from reasons of policy (*u*). Presumptions *juris et de jure* are scattered over our statute and common law, and have place both in civil and criminal causes. The following are the most important of them:—

§ 295. (1) In all civil questions where the rights of husband and wife depend on the birth of a living child, it is presumed *juris et de jure* that it did not live if it was not heard to cry (*x*). And where the question was whether the parents were entitled to a bequest left to them on condition of their "having two children living at any time," the Court held that the averments that a second child had been born alive, and continued to live during three-quarters of

(*o*) Ib., 4, 45, 17. (2). (*p*) Stair, 4, 46, 27—Best on Presumptions, 74, *et seq.* (*q*) *Supra*, § 5, *et seq.* (*r*) The division sometimes adopted into *presumptiones juris* and *presumptiones facti* is thought to be erroneous. All presumptions are *facti*; both the evidentiary matter and the inference being facts. (*s*) Stair, 4, 45, 12—Ersk., 4, 2, 35. (*t*) Stair and Ersk., *ut supra*. (*u*) Following up a view already suggested—§ 247, note (*c*),—the peculiarity of *presumptiones juris et de jure* may be stated thus—that while *presumptiones juris* and *presumptiones hominis vel judicis* have their natural probative value under a syllogism with the major premiss "Most A are B;" in *presumptiones juris et de jure* law creates an unnaturally close connection between the evidentiary and the presumed facts, and raises the major permiss into "All A are B." (*x*) Reg. Maj., 2, 58—Stair, 2, 6, 19—Ersk., 1, 6, 40—Dobie *v.* Richardson, 1765, M., 6183.

[5] In like manner, of two possible meanings of a deed, according to the one of which the deed will be legal, according to the other illegal, the law will presume the former to be the true construction; Best on Evid., 3d. ed., 447. So the law will prefer a meaning which makes a deed valid, to one which makes it void; Marwick *v.* Norfolk, 1855, 4 Ellis and Blackb., 397, 411.

[6] Williams *v.* Eyton, 1859, 4 Hurl. and Norm., 357.

an hour, that it had been seen to breath repeatedly, and that its heart had been distinctly felt to beat, were not relevant, because it was admitted that the child had not been heard to cry (*y*). The rule has not been applied in prosecutions for child-murder.[7]

(2) Law presumes that a pupil cannot understand his civil rights, and therefore that contracts and obligations undertaken by him are null (*z*). It seems strange that this rule should be so absolute, while pupils are every day punished for crimes. A child below seven years old, however, is held not to have understanding sufficient to commit a criminal act (*a*).

(3) A girl below twelve years of age is held to have neither understanding nor physical development sufficient to consent to sexual intercourse; so that proof even of eager consent will not prevent a verdict of rape against one having connection with her (*b*). In England it is held on the same grounds that a boy below fourteen cannot commit a rape (*c*). The reverse has been decided in this country (*d*). A pupil, however, cannot consent to marry (*e*); and in this question proof that *malitia suppleat aetatem*, although admitted by the canon lawyers, is rejected in Scotland (*f*).

(4) The statutory crime of concealment of pregnancy involves the presumption *juris et de jure* that a woman who conceals her condition from every person, and does not call for help at the birth, had a criminal indifference about the fate of her child (*g*).

(5) The statutes for preventing base coin (*h*),[8] and forged Bank of England notes (*i*), have made the possession by unauthorised persons of counterfeit coin or notes, or of apparatus for preparing them, full proof of crime, although it is only a strong presumption of it.

(*y*) Roberton *v.* Roberton, 1835, 11 S., 297. This decision, which was pronounced against a very clear opinion of Lord Meadowbank, is thought to be questionable.

(*z*) Stair, 1, 10, 13, (1)—Ersk., 3, 1, 16. (*a*) 1 Hume, 35—1 Al., 666.

(*b*) 1 Hume, 303—1 Al., 213. (*c*) 1 Hale, 630. (*d*) Fulton, 1841, 2 Swin., 564 (this decision was pronounced on circuit)—Burnett, 102.

(*e*) Ersk., 1, 6, 2, and Ivory's note, 134—1 Fraser, 42. (*f*) Ersk., ib.—1 Fraser, 43—Johnstone *v.* Ferrier, 17th November 1770, F. C. M., 8931.

(*g*) 1 Hume, 295—1 Al., 153. (*h*) 2 W. IV, c. 34. (*i*) 45 Geo. III, c. 89.

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[7] In England, evidence of the performance of any vital act, as of the beating of the heart, is, in civil causes, proof that the child was born alive; Brock *v.* Kellock, 1861, 30 L. J. Ch., 498. In Scotland, under an indictment for child-murder, the prosecutor must prove that the child was fully born, and had an existence separate from the mother; Jean M'Callum, 1858, 3 Irvine, 187.

[8] Coinage Offences Act, 24 and 25 Vict., c. 99, §§ 6, 7, 8, 23, 24, 25. The Act 2 Will. IV, c. 34, is repealed by 24 and 25 Vict., c. 95.

(6) The law of deathbed makes facility and improper influence a presumption *juris et de jure* from the granter of the deed being at the time of its execution ill of the disease of which he died, and dying within sixty days after its date, without having been at kirk or market in the interval (*k*).[9]

(7) Deeds which one who was insolvent at their dates, and who has afterwards become bankrupt, granted in favour of conjunct or confident persons without onerous causes are presumed, *juris et de jure*, to be fraudulent devices to defeat the rights of his creditors (*l*).

(8) It is a presumption *juris et de jure* that no one is ignorant of the law of the land (*m*). Even a foreigner contracting in this country is presumed to know the law applicable to the agreements into which he enters (*n*).

§ 296. *Presumptiones juris*, and *presumptiones hominis vel judicis* (*o*), (unlike *presumptiones juris et de jure*), may be overcome by contrary evidence. They differ from each other only in this, that *presumptiones juris* have an established place in law, partly on account of their natural strength, and partly from the repeated occurrence of the facts from which they flow; they may be said to spring from the experience of the law; whereas *presumptiones hominis vel judicis* emerge daily in individual cases, and are suggested by the experience of the judge or jury. These two classes of presumptions do not differ in point of probative force. Both of them admit of various degrees of strength; and a *presumptio juris* may be overcome by a *presumptio hominis vel judicis*, as the presumption of innocence yields to proof of circumstances inferring guilt.[10]

(*k*) 1696, c. 4—Stair, 3, 4, 27—Ersk., 3, 8, 96—Bell's Pr., § 1786, *et seq.*

(*l*) 1621, c. 18—2 Bell's Com., 186. (*m*) Stair, 4, 45, 17, (20)—Ersk., 1, 1, 21, and 3, 3, 54—1 Hume, 26—Cloup *v.* Alexander, 1831, 9 S., 448.

(*n*) Cloup *v.* Alexander, *supra.* (*o*) Stair, 4, 45, 12—Ersk., 4, 2, 37.

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[9] When a holograph *mortis causa* writing is prejudicial to the heir at all, it is presumed to have been executed on deathbed, but the contrary may be proved; Fairholme *v.* Fairholme's Trs., 1856, 19 D., 178.

[10] "A *presumptio juris* may be introduced either by statute or custom; it may have its origin in some strong natural probability, assented to by the general voice of mankind, or in some usage of trade, drawing uniformly the same inference from a certain fact, or combination of facts; but, before it can have the authority of a proper *presumptio juris* it must be recognised and take its place as a part of the system to which it belongs. Till it has been so recognised it is fact, and not law." There is no *presumptio juris* that an agent, purchasing or selling for a disclosed foreign principal, is personally liable. The question in each case is for a jury. The presumption of fact, that the

§ 297. In England it would seem that the distinction between these classes of presumptions lies in this, that the judge is bound to direct, and the jury to find, in favour of a party holding a *presumptio juris* unrebutted; so that, if they disregard it, new trials, *toties quoties*, will be granted as matter of right—but that, on the other hand, it is discretionary in the Court to grant a new trial where the verdict is only against a *presumptio hominis vel judicis* (*p*). Another difference between these classes of presumptions in England is, that wherever the facts which raise a *presumptio juris* appear on the pleadings, the Court will draw the inference without the aid of a jury; which they will not do when the presumption is only *hominis vel judicis*. As our law of presumptions was matured before the introduction of jury trial in civil causes, and as our criminal practice has never allowed exceptions from the judge's charge, the first of these distinctions has not been established in this country. The second, however, is consistent with our principles and practice.[11]

§ 298. Some *presumptiones juris* can only be redargued by writ or oath of party; while in regard to others the contradictory proof is unlimited. All the former class are noticed in the following chapters, which embrace the leading *presumptiones juris* established in Scotland.[12]

(*p*) Best on Presumptions, 17 and 44—1 Phil., 460. English lawyers are not agreed under which of these heads several of their presumptions should be ranked.

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agent is liable, is stronger when he buys than when he sells, because it is more easy to suppose in the former case than in the latter that the agent undertakes specific implement; Millar *v.* Mitchell, 1860, 22 D., 833—Heald *v.* Kenworthy, 1855, 10 Hurl and Gord., 742—Green *v.* Kopke, 1856, 18 Scott's C. B., 549.

[11] Where the patent of creation of a Peerage does not appear, it is a fundamental proposition in peerage law that the presumption is in favour of heirs male, but that presumption may be rebutted; Herries' Peerage Claim, 1858, 8 Macqueen, 585, *per* Lord Brougham.

[12] Reference may here be made to the following statutory presumptions under recent acts:—A bill of lading in the hands of a consignee or indorsee, for value, is conclusive evidence of the shipment of the goods entered in the bill as against the person signing it, unless the holder has received actual notice, at the time of receiving the bill of lading, that the goods were not in fact laden on board: Provided that the party signing the bill may, if the goods have not been shipped, exonerate himself by showing that the misrepresentation in the bill of lading was caused without his fault and by the fraud of the shipper, or holder, or other person through whom the holder claims;—18 and 19 Vict., c. 111, § 3.

When goods are sold for a specified and particular purpose, warranty that they are fit for that purpose is implied; 19 and 20 Vict., c. 60, § 5. 25 and 26 Vict., c. 88, §§ 19 and 20, provides that, after 31st December 1863, in sales of articles with a trade mark, there

CHAPTER II.—OF THE PRESUMPTION IN FAVOUR OF LIFE.

§ 299. The law of Scotland recognises a presumption in favour of the continuance of life for a reasonable period, so as to lay the burden of proving death upon the party alleging that fact (*a*). A precise limit to this presumption has not been fixed. Lord Bankton states it at a hundred years (*b*); Lord Stair says some extend it to that time, and others only to eighty years (*c*); while Mr Erskine does not define its duration (*d*).[1]

§ 300. Of course this presumption may be overcome by direct evidence of death; and in several cases regarding persons supposed to have died abroad the Court admitted evidence on this head from sources not strictly regular, as being the best proof that the circumstances admitted of (*e*).

The presumption of life may also be overcome by circumstances which raise a contrary probability. The following cases illustrate the views of the Court on the point.

§ 301. On the one hand the presumption of life was held not to be overcome in the following cases. Where a sailor in the prime of life disappeared suddenly at a seaport in England, and was not heard of during forty years afterwards, the Court presumed that

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(*a*) Stair, 4, 45, 17 (19)—Ersk., 4, 2, 36. (*b*) Bank., 2, 6, 31, and see Carstairs *v.* Stewart, 1734, M., 11,633, Elch. "Presumption," No. 13. (*c*) Stair, *supra.* (*d*) In considering this presumption, the number of years at which an actuary would calculate the value of the life ought to be proved, as affording the *datum* point of its probable duration. The Court could then fix what additional years they would allow, according to the circumstances of the case. (*e*) Lawrie *v.* Drummond, 1670, M., 12,643—M'Lerie *v.* Glen, 1707, M., 12,565 (Fountainhall)—Henderson *v.* Morton, 1710, M., 12,646—Stewart *v.* Hay, 1760, M., 11,675—Forrester *v.* Boucher, 1760, M., 11,674—See *infra*, § 304, compared with Straiton *v.* Straiton, 1767, M., 11,679—Tait, 482.

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shall be implied a warranty that the trade mark is genuine; and in sales of articles on the label of which there is a statement respecting "the number, quantity, measure or weight" of the article, or the place in which it was made or produced, a warranty shall be implied that the statement is in no material respect untrue, unless in either case the contrary shall be expressed in writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

[1] "We have fortunately no rule founded on presumptions derived from the lapse of any fixed period of time, and every case which I have ever seen shows how unwise it would be to attach any such weight merely to the lapse of a certain number of years, without regard to the age and character of the party and his condition in life, and the character of the country in which he was last resident;" Lord Justice-Clerk Hope in Fife *v.* Fife, 1855, 17 D., 954.

he survived his father who died four months after the disappearance (*f*).

In 1801 a man aged thirty left Glasgow for America. The last letter from him (which was to his brother) was dated in 1804, and he had not been heard of from that time to the date of the action in 1845. He had never written to his wife, having been much dissatisfied with her conduct when he left. About 1803, when he was known to be alive, she began to cohabit in Glasgow with another man, with whom she continued to live till his death in 1810; and during the whole of the intervening period that person and she were reputed man and wife. In a question whether that person and she were married, and whether their children (the one a posthumous child, and the other born in 1808) were legitimate, the Court held that there was not ground to infer that the first husband was dead when the second connection began, or at any time during its subsistence, and consequently they held that the children were illegitimate (*g*). So where there were letters in 1819 from a person in New York of middle age stating that he had then two sons, it was held in 1834 that the lapse of the intervening years, and the want of intelligence during them, did not raise a presumption that both he and his sons had died (*h*). Again, the Court held that it was not sufficient to infer death, that the individual, who at the date of the action would have been about fifty years old, had gone to Tobago as a sailor, and had not been heard of for twenty years (*i*). In another case a man bred a seaman had in 1803 left Liverpool for Pictou; and at the time of the action in November 1841 no tidings of him had been received since 1804. This person's heir having claimed two sums, one of which he had right to if his ancestor had died before the case came into Court, while he had only right to the other in the event of the ancestor having died either before 1812 or after 1832; the Court considered it likely that the ancestor died before 1841, and therefore allowed the heir to receive the former sum and corresponding interest, on finding security to re-

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(*f*) Bruce *v.* Robson, 1834, 12 S., 486. The question arose on a claim by the father's trustees, to be allowed credit for a debt due by the son, which, twelve years after the disappearance, they had paid, on the assumption that he had survived his father.

(*g*) Lapsley *v.* Grierson, 1845, 8 D., 84. This case was very carefully and elaborately considered both by the bench and the bar. (*h*) Reid *v.* Brown, 1834, 12 S., 278. (*i*) Campbell *v.* Lamont, 1824, 3 S., 145. The point occurred in an application by the party's heir, to uplift a sum on the presumption of death, and the Court seemed willing to allow this on caution; which, however, the heir could not find. See the same case ten years later, *infra*, § 306.

peat in case the party had survived; but they required the latter sum to remain consigned in the meantime, because there were no data for ascertaining the probable time of the supposed death (*k*).

§ 302. In a recent case where a judicial factor *loco absentis* raised an action for reducing a service obtained by one whose right as heir would have been posterior to that of the absentee, if alive, the defender pleaded that the factor had no title to sue, and at all events that his absent constituent was to be regarded as dead. It appeared that about nineteen years previously the latter had left this country for New Orleans, that he had not been heard of since, and that although the succession had opened before his departure, he was likely not to have known of it, as it was taken up by another person, whose title was not set aside until several years afterwards. On these facts the Court, while sustaining the general competency of the pursuer's title as factor *loco absentis*, were much perplexed by the question of the absentee's death; as they did not consider that there was sufficient ground for holding the presumption of life to be overcome. They ended in sustaining the competency of the action, on the absentee's sisters (whose right was also preferable to the defender's) becoming joint pursuers with the factor; since, if the absentee were alive, the instance of the factor was good, and if he were dead, the sisters were entitled to sue (*l*).[2]

§ 303. On the other hand the presumption in favour of life may be overcome by proving that the individual was engaged in a perilous occupation, that he sailed in a vessel which has not been heard of, although it should have long ago reached its destination, or that he has been abroad for many years without any intelligence showing that he is still alive, especially if he had previously been accustomed to correspond with his friends at home. Regard is also paid to the circumstance of his friends or relations reputing him to be

(*k*) Garland *v.* Stewart, 1841, 4 D., 1.

(*l*) Kennedy *v.* M'Lean, 1851, 13 D., 705.

[2] A labourer deserted his wife and child and went to America. He was never heard of after 1833. The Court refused to hold that he was dead in 1850, when, if alive, he would have been about fifty-two years of age; Fife *v.* Fife, 1855, 17 D., 951. An individual who, if alive in 1862, would have been seventy years old, was last heard of in Nova Scotia in 1849. In 1854 his brother died, and the succession to his property opened to him if he was alive. Careful inquiries were made about him in the places where he had previously lived, but no information was obtained. In an action by his representatives it was held, in 1862, that the presumption for his survivance had not been overcome; Barstow *v.* Cook, 1862, 24 D., 790.

dead (*m*). When the Court consider the inference of death to be sufficiently strong, they give effect to it at once; but when they think there is a chance, not very remote, of the person being still alive, they require the party claiming any succession or other right on the footing of his death to find security to repeat in the event of the absentee being found to be in life.

§ 304. Thus the presumption of life was overcome in an old case where a soldier had gone to France six or seven years before, had been engaged in a "flagrant war," and had not been heard of since; because the death of private soldiers cannot always be ascertained in such cases (*n*). Again, when one had gone to Barbadoes, and after being successful in business and acquiring a considerable estate there, had become a privateer on the coast of Jamaica, had not returned to Barbadoes, and was there reported to be dead, the pursuer, who was his wife, having produced an affectionate letter from him, dated about three years before the action, promising to return to Scotland in a short time, and having also deponed that he had not written her since, and that she did not know of his being alive; these circumstances were held to overcome the presumption that he was still in life (*o*). Death was inferred from the circumstance that the person had embarked for Norway two years before, and that neither the ship nor any on board of her had been heard of since (*p*). Where an adjudication against one charged in 1739 to enter heir to his father was challenged in 1754, upon the ground that the supposed heir was dead before the date of the charge, the Court, on advising (*ex parte*) a proof of a current report that the heir had sailed from Philadelphia in a ship bound for the West Indies which had never been heard of afterwards, and was reported amissing, together with hearsay that the wife of the master of the vessel had married again, sustained the reason of reduction (*r*). In June 1806 a person sold an estate for a price payable by instalments. In the following autumn, having entered the service of the East India Company, he sailed for India. The ship was never heard of after passing the Cape of Good Hope; and the general be-

(*m*) For a strong illustration of this (although a questionable decision) see Aitken *v.* Goodlets, 1707, M., 5553, M., 12,646. Several instances where repute of death was regarded are given below. (*n*) French *v.* E. Wemyss, 1677, M., 12,644. See also Glendinings *v.* Earlston, 1631, M., 12,725. (*o*) Sands *v.* her Tenants, 1678, M., 12,645. This, being an action of mails and duties by the widow as liferentrix on her husband's death, was a favourable case for the pursuer. (*p*) Erskine *v.* Stephen, 1622, M., 11,656. (*r*) Forrester *v.* Boucher, 1670, M., 11,674. The report does not state when the vessel sailed.

lief was that she had foundered at sea and that all on board had perished. One of the instalments, becoming due at Whitsunday 1808, was lodged by the purchaser with the seller's banker. On 2d November 1808 the seller's brother was served heir to him on the evidence of two witnesses deponing to the propinquity and the belief of the family that the seller died in India. The case came before the Court in January 1811, in a suspension by the purchaser of a threatened charge for payment of the instalments then due. Their Lordships considered the case a very doubtful one; and on their suggestion it was arranged by the brother finding security to warrant the purchaser against all risk from the payment, the bond of caution being limited to seven years from 24th January 1811 (*s*).

§ 305. Again, where trustees had been appointed to divide a sum at the death of two annuitants for £10 each, and it appeared that both of them had gone abroad, the one as a private soldier, and the other as a common sailor, that neither had been heard of for thirty-two years, and it was reported that the soldier had been wounded in the battle of Walcheren,—the Court, after advertisements in Scotch and English newspapers, allowed the sum to be paid to the party ultimately entitled to it, on a personal bond being granted by him and his two sons to make the annuity and arrears furthcoming, if the annuitants claimed them (*t*). In another case the Court allowed the substitutes in certain legacies to uplift them on caution, where the legatees first favoured were two brothers, sailors, one of whom had been absent for thirty-four, and the other for twenty-four years, the latest intelligence from the former having been about one year after his departure (during which year he had written several letters home), and no letters having ever been received from the latter (*u*). A similar course was followed as to a person who had left twenty-five years before for the East Indies, and was reputed to be dead (*x*). So where a legacy was left to one who was in the Eastern seas at the time, and failing him to his sister, the Court, on account of his absence for seventeen years without any intelligence, allowed her representatives to uplift it on caution (*y*). In another case a question arose in 1849, as to the succession by conquest to James, the third eldest of five brothers, Andrew, Samuel, James, Matthew, and William. Samuel, who was

(*s*) L. Ashburton *v.* Baillie, 7th February 1811, F. C. (*t*) Stirling *v.* Mackenzie, 1847, 9 D., 923. (*u*) Fettes *v.* Gordon, 1825, 4 S., 149. The ages are not reported. (*x*) Hyslop *v.* Gordon, 1830, 8 S., 919. Age not reported.

(*y*) Ruthven *v.* Clark, 1628, M., 11,629, 8048. It was said that the expense of a proof would have exhausted the legacy.

a seaman in the royal navy, had not been heard of since 1814; if alive at the date of the action, he would have been in his sixty-third year; Andrew had predeceased James; and his daughter, on the footing that Samuel also had predeceased James without issue, made up a title as heir of conquest to James, and entered into possession. It appeared that there was a common belief in Samuel's death, and that repeated advertisements in the newspapers had failed to bring forward either him or any one claiming to be his heir. The two younger brothers, Matthew and William, having applied to the Court for the appointment of a factor *loco absentis* to Samuel, who, they contended, might be alive, or might have left issue, the application was refused on Andrew's daughter finding caution for the full rents drawn and to be drawn by her, which she would have to repeat in case it turned out that she was not the true heir. The Court gave no sanction to her selling the estate; and she would have had considerable difficulty in doing so, in consequence of the state of the title (*z*).

§ 306. Again, where it was proved that a man had gone to Tobago as a sailor, had soon afterwards taken service on board a privateer, there being hearsay that a boat in which he was had been swamped, and that he had been drowned; and where he had not been heard of for twenty-nine years, and his family, after making inquiries, believed him to be dead, the Court allowed his heir (without finding caution) to uplift a capital sum which belonged to him (*a*). So where decree had been obtained against a woman for payment of articles furnished for her house-keeping, and she suspended a threatened charge thereupon on the ground that her husband had not been called in the action, it was held a relevant answer that he had been out of the country for twenty years, and that she was reputed a widow (*b*). In a claim for terce and *jus relictae* it was held sufficient to infer the husband's death that one of the same name, and appearing from the circumstances to be the same person, had been hired to go to the East India Company's factories in Bengal about nineteen years before, and had not been heard of since, that he was commonly reputed to be dead, and that the pursuer had on that footing been paid part of his wages by the India Company (*c*).[2]

(*z*) Chalmers *v.* Carruthers, 1849, 11 D., 1359. (*a*) Campbell *v.* Campbell's Tr., 1884, 12 S., 382. See the same case ten years earlier, *supra*, § 301.

(*b*) Hay *v.* Corstorphine, 1663, M., 5956. (*c*) Hogg *v.* Hume, 1706, M., 12,645.

[2] A man was, in 1858, held to be dead who in 1856 left New Zealand for Sidney;

§ 307. It is not a sufficient ground for inferring death, that the person's heir has expede a service to him (*d*), or has taken out confirmation as his executor (*e*), both of these proceedings being *ex parte*. They may, however, be relevant circumstances in the case (*f*); and under the modern practice the publication which precedes a service makes it a more valuable adminicle of evidence, than was a service in the old form (*g*).

§ 308. The greatly increased communication with most foreign countries, and the admirable postal arrangements over nearly the whole world, ought, in most cases, to make a shorter period of absence sufficient to infer death, than was recognised in former times.

§ 309. In England the presumption of life ceases with seven year's absence, on the analogy of the statutes 1 James I, cap. 11, § 2, regarding bigamy, and 19 Charles II, cap. 6, § 2, regarding

(*d*) L. Ashburton *v.* Baillie, 7th February 1811, F. C.—Campbell *v.* Lamont, 1824, 3 S., 145—Reid *v.* Brown, 1834, 12 S., 278. (*e*) French *v.* E. Wemyss, 1677, M., 12,644—Bannermans *v.* Bannerman, 1738, M., 11,662—Burn *v.* Ogilvie, 1753, M., 11,667. (*f*) Cases in two preceding notes. (*g*) 10 and 11 Vict., c. 47, § 7.

the ship never having reached Sidney or been heard of again; Norris, 1858, Swab. and Trist. Prob., p. 6.

Mr Fairholme, of Chapel, died in May 1853. He destined his personal estate to his nephew, Lieutenant James Fairholme, and failing him, to George Fairholme, brother of James. George Fairholme claimed the personal estate on the ground that his brother had predeceased the testator. Lieutenant James Fairholme left England in May 1845 along with Sir John Franklin's expedition to the Arctic Seas. The party consisted of one hundred and thirty-three individuals. They wintered in Beachy Island; but were not heard of afterwards till 1854; when Dr Rae, a chief factor in the Hudson's Bay Company's service, was told by the Esquimaux that, about the spring of 1850, they had seen a party of about forty white men near the north shore of the island called King William's Land; that they seemed thin, and were supposed to be in want of provisions; and the Esquimaux (whose language none of them could speak) understood that their ship had been crushed by the ice, and that they were going in search of deer. At a later date, in the same season, the dead bodies of thirty persons were discovered by the Esquimaux on the continent, at a place supposed to be Back's River. Various articles were lying beside them; and, among other things, a silver fork which was deponed to as having belonged to Lieutenant Fairholme. Fresh bones and feathers of geese were found near the dead bodies; and it was proved that the wild fowl did not, in their migrations, reach that part of the coast till about the end of May. Witnesses conversant with the locality deponed that it was nearly impossible that any of those who accompanied the expedition could have survived so long as 1853 without having been heard of. In these circumstances the Court ordered payment to George Fairholme of his uncle's personal estate, without requiring caution; Fairholme *v.* Fairholme's Trs., 1858, 20 D., 813. In an English case, Sir John Romilly held that a sailor who formed one of Sir John Franklin's expedition, and who, when he sailed, was young and strong, had survived January 1850; Ommaney *v.* Stilwell, 1856, 23 Beavan's Ch., 328.

leases; in both of which that period is prescribed (*h*). But this rule raises no inference as to the time of the supposed death (*i*).[3]

§ 310. Puzzling questions of succession sometimes arise where persons died from the same calamity, as in cases of shipwreck, battle, suffocation, and the like. Some codes have laid down general rules of presumption for such cases, where the circumstances do not indicate which person was the survivor. Thus in the Roman law, where a father and a son fell in the same battle, the son was held to have survived; and where a father, or mother, and son perished in the same calamity (*e.g.*, shipwreck), the question depended on whether the son was above puberty; if he was, he was held to have survived; if not, his father or mother was presumed to have outlived him (*k*). In the case of a husband and wife, the former was held to have survived (*l*). By the Code Napoleon (*m*), "if those who perished together were less than fifteen years old, the older of them is presumed to have survived; if they were both beyond sixty years old, the younger is presumed to have survived; and if one of them was within fifteen and the other beyond sixty, the former is presumed to have survived;" if they were both within these extremes and of different sexes, the male is held the survivor, unless the difference between the ages exceeded a year; and if they were of the same sex, the law, favouring the order of nature, holds that the younger died last. In Mr Beck's valuable treatise (*n*) the medical jurisprudence of such questions is fully considered, and the decisions both in the English and foreign Courts are carefully analysed. It will there be seen that in some cases the less robust persons usually survive—as the youngest where all are overtaken with thirst, and the women, where both men and women die of suffocation from carbonic acid gas. Important evidence may often be derived from the relative positions of the bodies; and in every

(*h*) See 1 Phil., 449—Best on Presump., 190. (*i*) See 1 Phil., ib.—Best on Presump., 191. (*k*) Dig., L. 34, T. 5 (*de rebus dubiis*), 9, §§ 1, 4, and L. 34, T. 5, 22. (*l*) Ib., L. 34, T. 5, 9, § 3. (*m*) Code Civil, § 720, 1, 2. (*n*) Beck's Med. Jurispr., 389.

[3] Best on Evidence, 3d ed., 509. This presumption, however, does not hold where, from the circumstances of the case, there was no probability that the person would have been heard of though alive; Bowden *v.* Henderson, 1854, 2 Smale and Giff. Ch., 360.

Probate in England was granted of a will as by a widow who died in February 1857. Her husband had gone to America, and had reached Albany, New York, in April 1850, and had not been heard of since, though inquiries had been instituted; Elizabeth How, 1858, Swabey and Trist. Probate, 53.

case there should be an inquiry into the existence of any disease or peculiarity of constitution tending to accelerate death.

§ 311. Several cases have occurred in England on this subject, but without bringing out any fixed presumptions; and the result seems to be, that each question must be remitted to a jury for decision on its own circumstances (*o*). A recent writer (*p*) on that law remarks, that if the plaintiff can show no further evidence than the assumption that from age or sex one party struggled longer than another, it seems that no decree would be given in favour of the claim.[4]

No authority in the law of Scotland has been found on these points.[5]

CHAPTER III—OF THE PRESUMPTION *PATER EST QUEM NUPTIAE DEMONSTRANT.*

§ 312. Law justly presumes the legitimacy of all who are conceived during lawful wedlock, according to the maxim of the Roman jurists *pater est quem nuptiae demonstrant* (*a*). This presumption applies only where there was such an interval between the marriage and the birth that, by the laws of nature, the conception can reasonably be believed to have taken place during marriage (*b*).

(*o*) Best on Presumptions, p. 193, 201—Taylor, 130—See Sillick *v.* Booth, 1 Young and Col., 117, 126, per Knight Bruce, V. C. (*p*) Best on Presumptions, p. 201, 2. (*a*) Dig., L. 2, T. 4, 5—Stair, 3, 3, 42—Ersk., 1, 6, 49—Bankt., 1, 2, 3—Wallace, 264—Tait, 488. This presumption is fully and ably treated of by Mr Fraser, 2 Pers. and Dom. Rel., 1, *et seq.* (*b*) Authorities in note (*a*). In England a

[4] In Wing *v.* Angrave, 1860, House of Lords, 30, L. J. Ch., 65, it was held that when several persons die from the same cause, there is no presumption either that they all died at the same time, or that any one of them died before the others. When, in a wreck at sea, a husband and wife were swept overboard and drowned, the Court held that they could not decide which of them died first; Underwood *v.* Wing, 1855, 24 L. J. Ch., 293—Best on Evidence, 3d ed., 512.

[5] The Merchant Shipping Act's Amendment, 1862, 25 and 26 Vict., c. 63, enacts (§ 21), that in all proceedings for recovery of wages, as having been due to seamen or apprentices lost with the ships to which they belonged, if "it is shown by some official return produced out of the custody of the Registrar General of Seamen, or by other evidence, that the ship has, twelve months or upwards before the institution of the proceeding, left a port of departure, and if it is not shown that she has been heard of within twelve months after such departure, she shall be deemed to have been lost, with all hands on board, either immediately after the time she was last heard of, or at such later time as the Court hearing the case may think probable."

§ 313. The presumption has no place in proving the paternity of one who claims legitimation *per subsequens matrimonium* (*c*). Lord Stair lays down that it holds whether the marriage is regular or clandestine, provided the parties could have contracted a lawful marriage (*d*). It also seems to apply where the children were born during a cohabitation which followed on a promise of marriage (*e*). But where a man, sued to fulfil a promise of marriage followed by copula, admitted that he had had intercourse with the pursuer, and that on her becoming pregnant he had, by her urgent desire, given her a writing acknowledging that he had previously promised to marry her, but where he stated that he had not had connection with her afterwards,—the defence to the action being that the pursuer had subsequently become pregnant to another man,—the Court held that the presumption *pater est*, &c., was not sufficient to prove that the second child had been begotten by the defender, and they therefore required the pursuer (apparently before answer) to state whether she could prove any cohabitation after the date of the writing (*f*). This case justly recognises a distinction between a promise which has been followed by cohabitation, and a promise with isolated *coitus;* holding that the latter is not sufficient to raise the presumption in question.[1]

§ 314. Of course this presumption applies if the husband has had access to his wife at the commencement of the ordinary period of gestation. As, however, exceptional periods not unfrequently occur, the presumption covers these within certain reasonable limits; because law both presumes against adultery and in favour of legitimacy. Accordingly, while the common period of gestation

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child is presumed to be legitimate although born within a day after the marriage; and the shortness of the interval is only an element in the evidence by which the presumption may be overcome; Co. on Litt., 244, a—1 Rolle's Abridg., 358, *voce* Bastard, letter B—1 Blackst. (Stewart's 3d ed.), 570—King *v.* Luffe, 1807, 8 East., 193, 208. The ground for this anomaly is, that the English law not admitting legitimation *per subsequens matrimonium* (as Scotch law does), yet refuses to bastardise the child of parents who were married during its gestation; Blackst., *ut supra.*

(*c*) Innes *v.* Innes, 1835, 13 S., 1050; affd. 2 Sh. and M'L., 417. (*d*) Stair, 3, 3, 42, and 4, 45, 20. (*e*) Stair, *supra;* and see Craig, 2, 18, 19, 21.

(*f*) Baptie *v.* Barclay, 1665, M., 8413, Gilmour's report. The report by Stair (M., ib.) does not state that the proof was only before answer, but bears broadly, "the Lords found that the presumption was not sufficient unless it had been a formal marriage."

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[1] In the case of Walker *v.* Walker, 1857, 19 D., 290, a person born before the marriage of his mother was held to be the son of the man she afterwards married, although his mother, when of an advanced age, and after her husband's death, emitted a declaration to the contrary.

is 280 days (that is nine calendar months and a week, or ten lunar months) (*g*), the presumption in question applies if the husband has had access any time not later than six complete lunar months(*h*), which is a week or two shorter than the period which physiologists consider necessary for maturing a living child (*i*).

Protracted gestations are rare in comparison with those which are accelerated; and therefore the other limit to the presumption is only ten months (*k*). It has not been settled whether this means calendar or lunar months; but the weight both of authority and reason is thought to be in favour of the longer period (*l*). If the only opportunities for access have been either later or earlier than

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(*g*) Beck, Med. Jurisp., 356—Taylor, Med. Jurisp., 568—Evidence in Gordon Peerage case, and in Innes *v.* Innes, 1837, 2 Sh. and M'L., 417, 13 S., 1050.

(*h*) Stair, 3, 3, 42—Bankt., 1, 2, 3—Ersk., 1, 6, 50—Wallace, 264—Tait, 489—2 Fraser, 1—Routledge *v.* Carruthers, 19th May 1812, F. C., per L. President—Lepper *v.* Brown, 1802, Hume D., 488—See also Jobson *v.* Reid, 1832, 10 S., 594; 7 F. C., 456. The Roman law recognised six solar months; Dig., L. 1, T. 5, 12. Our law has from favour to legitimacy substituted lunar months; Ersk., *ut supra.*

(*i*) It seems to be nearly agreed among medical jurists that a seven month's child may live and thrive, that a child of less than six months will not survive, except perhaps for a few minutes, and that a child born between six and seven months of conception will be sickly but may live. Consequently, if the child is fully matured and healthy, there is very strong ground for doubting whether it could have been conceived less than seven calendar months before delivery; Beck, 362—Taylor, 518, *et seq.* Accordingly, in Heathcote's divorce bill (1851, 1 Macq., 277), where the wife's adultery was proved, and she bore a full-grown child six lunar months and one week after her husband's return from abroad to her society, the bill was passed, and contained a clause bastardising the child. But in M'Lean's divorce bill (1851, 1 Macq., 278), where it was clearly proved that the wife had committed adultery before leaving England to join her husband in India, and she bore a child seven lunar months and a day after she rejoined him, the House of Lords passed the bill, but refused to introduce a bastardising clause. As no one attends the House to protect the interests of the child, their Lordships require a strong case to be made out before they introduce a clause of bastardy; 1 Macq., *ut supra.*

(*k*) Bankt., 1, 2, 3—Ersk., 1, 6, 49—Tait, 489—2 Fraser, 1. See also next note. Stair, 3, 3, 42, somewhat loosely mentions the presumptive period as at nine, ten, or even eleven months.

(*l*) As the presumption was originally derived from the civil law, the solution of this question may partly depend on the mode of calculating time which that law referred to. The Digest (L. 1, T. 5, 12—L. 38, T. 16, 3, § 11, 12) lays down both the six and ten month's periods on the authority of Hippocrates, who defines the month at thirty days. (Hipp. *de partu octomestri* (*ad finem*), Frankfort ed., 1596, page 222.) This is consistent with the time pointed at by the Twelve Tables, which decree that a child born ten months after the husband's death shall be held legitimate. (Table 4, Law 3. See Bouchaud sur XII Tab., tom. i, p. 478.) Taking the Greek calendar at the date when the tables were compiled (B.C. 450), months of thirty days will be the rule; and by the Roman reckoning the result will be nearly the same—eight of the Roman months alternating thirty-one and twenty-nine days, and of the remaining four months, one numbering

these periods respectively, the presumption in question does not apply, and therefore the legitimacy of the child must be proved; so great a departure from the usual period of gestation reversing the burden of proof (*m*).

§ 315. In actions of filiation of children born bastards the Court have assoilzied the defender, when the pursuer's case depended on an alleged gestation of 301 days (*n*), of 306 days (*o*), and of eleven lunar months—308 days (*p*). So an admitted connection, five months before delivery, was held not to raise a *semiplena probatio* of paternity (*r*); while in another case, the unusual period of gesta-

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twenty-eight and the other three twenty-nine days. (Smith's Dict. of Greek and Roman Antiq., Art. *Calendarium*, 2d ed., p. 229.)

According to Touiller, the Roman law meant months of thirty days. (*De droit civil*, tom. ii, pp. 113, 115.) This is also the opinion of Attorney-General Copely (Lord Lyndhurst) in summing up officially, and not as counsel for either claimant, the evidence in the Gardner Peerage case. (Separate Report, p. 328.) Bouchaud, citing Hippocrates and Galen, holds that solar months were intended, and he defines them at thirty days ten hours and thirty minutes (*Sur XII Tables*, tom. i, p. 481, 2); and Erskine takes the same view (B. 1, T. 6, § 50), which is supported by the Cod. Justin., L. 7, T. 63, 5, pr. Opposite opinions on the question whether ten calendar or ten lunar months form the rule, were expressed by the Lords Ordinary Gillies and Meadowbank in an important case, which the Court decided on other grounds; Sandy *v.* Sandy, 4th July 1831, 2 S., 406 (new ed.).

Independently of the Roman law, there seems to be good ground for fixing the time at ten calendar months; because the analogy of the six month's period for the accelerated delivery requires the usual period of ten lunar months to be extended, so as to cover cases of occasional protraction. This view is supported by a case of filiation where the Court found a party liable for the aliment of a bastard, although the only alleged or proved connection was exactly ten calendar months before the birth; Morrison *v.* Kirk, 7th February 1795, not reported, but cited at length in the pursuer's "Information" in Sandy *v.* Sandy, *supra*.

Medical jurists are not agreed as to the probability, or even the existence of cases of protracted gestation. The correct view seems to be that a delay of two or three weeks beyond the ordinary period is not unfrequent, and that there are well established cases of gestation for forty-four and even forty-six weeks; that is, four to six weeks beyond the common period; See Taylor, Med. Jur., 528, *et seq.*—Beck, Med. Jur., 363, *et seq.*—The medical evidence in the Gardner Peerage case, and in Innes *v.* Innes, 1837, 2 Sh. and M'L., 417, 13 S., 1050. was very contradictory on this point.

By the Code Civil (§ 315), "the legitimacy of a child born three hundred days after the dissolution of the marriage cannot be contested."

(*m*) In the Gardner Peerage case, where the period founded on was three hundred and eleven days (eleven lunar months and three days) a deal of proof was gone into, and the House of Lords, without entering into the discussion of the *ultimum tempus*, decided against the legitimacy. See also Reid *v.* Jobson, 1832, 10 S., 594, 7 F. C., 456, S. C.—2 Fraser, 5. (*n*) Innes *v.* Innes, 1837, 2 Sh. and M'L., 417, affirming 13 S., 1050. (*o*) Boyd *v.* Kerr, 1843, 5 D., 1213. (*p*) Steward *v.* M'Keand, 1774, M., 11,664, 5 Sup., 554, Hailes, 595, S. C. (*r*) Paul *v.* Gilmour, 1824, 3 S., 368. See also Aitken *v.* Mitchell, 1806, Hume, 489—Le per *v.* Brown,

tion alleged (six lunar months and twenty-two days) was one of the grounds on which the Court held the paternity not proved, the child being full grown (*s*). An opposite result however was arrived at where the defender had opportunities of access eight lunar months (except four days) before the birth (*t*); and a proved connection exactly ten calendar months before birth, with the woman's oath in supplement that the child was then begotten, was held sufficient (*u*). In all such cases, therefore, the unusual period of alleged gestation is held to be an important element in the proof, making it likely that some other person than the defender had begot the child about the ordinary period. It therefore lays the *onus probandi* on the mother; whereas in questions of legitimacy the presumption *pater est*, &c., protects all cases within the prescribed periods, although the circumstance of unusual gestation may be an important element in the proof adduced to overcome the presumption (*v*).[2]

§ 316. Although the child of a married woman may have been born during the period covered by the presumption *pater est quem nuptiae demonstrant*, that presumption may be overcome by proof that the husband could not have begotten it.

§ 317. This may arise from the husband being impotent (*w*). The case then assumes a very difficult and delicate character, and has generally to be solved by the medical jurist. If the husband is dead the conditions of his organs will be important (*x*); and the

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1802, Hume, 488. In Reid *v.* Johnston, 1832, 7 F. C., 456, a child born one day less than six months after the marriage, was, after a proof, held to be a bastard.

(*s*) Folley *v.* Douglas, 1848, 10 D., 1424. (*t*) Robertson *v.* Petrie, 1825, 4 S., 333. (*u*) Morrison *v.* Kirk, not reported. Lord Meadowbank's notice of this case in Sandy *v.* Sandy, 2 S. (new ed.), 408, is corrected in the Session Papers of Sandy, where the case is fully narrated. (*v*) See Innes *v.* Innes, 1837, 2 Sh. and M'L., 448, per L. Chancellor—Gardner Peerage case, *supra*. (*w*) See Stair, 3, 3, 42—Ersk., 1, 6, 50—Dig., 1, 6, 6—Tait, 489—2 Fraser, 2. (*x*) Dundas *v.* Dundas, 1705, M., 4083—Sandy *v.* Sandy, 1823, 2 S., (new ed.), 406, and Sess. Papers.

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[2] When a child was born seven months and a half after the first alleged intercourse with the defender, and there was no proof that the birth was premature, it was held that the circumstances did not raise a presumption of paternity against the defender; Ritchie *v.* Cunninghame, 1857, 20 D., 35; but intercourse during the period of gestation, and opportunity at the time of conception, will raise the presumption of paternity; Lawson *v.* Eddie, 1861, 23 D., 876. As parties may now be witnesses, the evidence in filiation cases is taken and dealt with as in other cases, and there is now no question as to *semi-plena* probation; M'Bayne *v.* Davidson, 1860, 22 D., 738.

See, on the subject of protracted gestation, Taylor's Medical Jurisprudence, 7th ed., 1861, p. 610 and 624.

Court could probably order such an examination (*y*). An inspection of the husband's body during life is competent in England (*z*).

§ 318. The presumption will also be overcome, where during the whole period between six and ten months the husband was absent so continuously from his wife's society that he could have had no opportunity of connection (*a*). Such absence, whether arising from imprisonment, residence at a distance, or any other cause, must be completely proved; and therefore the fact that the husband had resided about twenty miles distant from his wife, without proof of continual absence, was held not to be enough (*b*). It is not necessary, however, that he should have been out of the country or beyond seas (*c*).

§ 319. But the illegitimacy is sometimes maintained upon circumstantial or moral evidence, and not on physical impossibility. In such cases, if it is not proved by the clearest evidence that the spouses had not connection during the presumptive period, the child will be held legitimate, although the wife had also adulterous connection, in which the conception may have taken place (*d*). The status of legitimacy does not depend on a balance of the probabilities whether the conception occurred during the conjugal, or during the illicit, intercourse. Our institutional writers go farther, holding that the presumption prevails, unless where physical causes prevented the spouses from having connection (*e*); and in this they are supported by the unanimous opinion of the whole Court in a carefully considered case; in which, however, the point did not require to be decided (*f*). In a later case, where the legitimacy of a child born nine calendar months and twenty-nine days after the husband's death was contested, the Court allowed a proof as to the state of the husband from his marriage till his death, and as to the alleged lewd character of his wife. The proof showed that his legs were broken and much shrivelled, that one of them crossed the other, and that he had been confined to bed for many years before the earliest possible date of conception. A man who had for years slept in the same room with him, and who knew his condition, "was of opinion that it was not possible for him" to have had sexual intercourse;

(*y*) It is understood that the M.S. records of the Commissary Court show several examples of this practice. (*z*) Townsend Peerage case, 1843, 75 Journ. H. Lords, 224. (*a*) Stair, 3, 3, 42—Ersk., 1, 6, 50—Tait, 489—2 Fraser, 4.

(*b*) Routledge *v.* Carruthers, 19th May 1812, F. C.; Buchan. Rep., 121; 4 Dow, 392; 2 Bligh, 692, S. C. (*c*) Stair, 3, 3, 42—Ersk., 1, 6, 50—Tait, 489.

(*d*) Authorities in next two notes—Best on Presumptions, 71—1 Phillips, 443—Taylor, 92—2 Starkie, 196. (*e*) Stair, 3, 3, 42—Ersk., 1, 6, 50—Bell's Pr., § 1626. See also Tait, 489. (*f*) Routledge *v.* Carruthers, *supra*, (*b*).

but two women who had dressed his corpse could not say that that was impossible. It was also proved that the wife's character was worthless, and that she had had intercourse with other men. The Court, on advising the proof, held that the child was a bastard (*g*). This case seems not to come within the strict rule; since the proof of absolute incapacity was not complete, and the Court allowed it to be supplemented by circumstantial evidence of a general character. It has been quoted (*h*) as indicating a departure from the old rule which requires a physical impossibility, and following the more just principle now recognised in England, that in each case the question is, whether the jury looking to the whole evidence, moral as well as physical, and having regard to the onus lying on the party alleging bastardy, are satisfied that the husband had not such connection with the mother as by the known laws of nature could have made him the father of the child (*i*). But although the case of Sandy tends to weaken the doctrine that proof of physical impossibility is indispensable, it cannot be said that the Court in deciding that case expressly sanctioned the opposite principle.*

§ 320. Stair, Craig, and Bankton, following the Canonists, hold that the presumption *pater est*, &c., may be overcome by the concurring testimony on oath of the mother and her husband (*k*). Er-

(*g*) Sandy *v.* Sandy, 1828, 2 S., 406, (new ed.), and Session Papers.

(*h*) 2 Fraser, 2—See also Doud *v.* Simpson, 1843, 9 D., 511. (*i*) Morris *v.* Davies, 1827, 3 Car. and Pay., 215, 5 Cl. and Fin., 163, S. C.—Banbury Peerage case, 1811, 1 Sim. and Stu., 153, and App. to Gardner Peerage case, p. 432, S. C.—1 Phil., 443—Best on Presumptions, 71—Taylor, 92. The former English rule required a physical impossibility in the husband to have been the father. Best and Phil., *supra*—2 Starkie, 196.

* Since § 319, *et seq.* of the text were written, the First Division of the Court have held that the presumption *pater est*, &c., may be overcome by such evidence as thoroughly satisfies the mind of the Court that the child is illegitimate, although there is not any proof of physical impossibility of connection between the spouses about the time of conception. The evidence was chiefly composed of the declarations of the spouses, both of whom had repeatedly declared the child to be a bastard; and these declarations were corroborated by circumstances. The proof presented the very peculiar feature, of the husband having co-habited with his wife after the birth of the child; having allowed it to remain in the house; and having even treated it with kindness. But the effect of this conduct on his part (which, under ordinary circumstances, would have been conclusive of the child's legitimacy) was taken off by the extraordinary fact that he had treated with similar kindness another child of his wife which unquestionably was a bastard, begotten when he was absent from the country on foreign service.—Mackay *v.* Mackay, 1855, 17 D., 494.[3]

(*k*) Stair, 3, 3, 42—Craig, 2, 18, 20—Bankt., 1, 2, 3—Decretal, 4, 17, 3. See also ibid., &c., 2, 19, 10.

[3] This note is from the addenda to the first edition.

skine (*l*) seems to have doubts upon this question, but states that "it is an agreed point by all writers, that if either of the spouses have, before making such oath, acknowledged the child as lawful, there is a right acquired to him by that acknowledgment, which is not to be taken away by any posterior testimony to the contrary." These authorities show that we do not in Scotland follow the rule of English law (*m*), which, from regard to decency, refuses to allow the spouses to be examined on the fact of non-access, or on facts which tend to prove or disprove access. But there is good ground for questioning the doctrine that either repudiation or acknowledgment by the spouses is conclusive. It is more in accordance with principle to hold that this evidence should be weighed along with the other proof in the case, and should only receive that value which is justly due to the testimony of the persons who are most likely to know the fact, but who are not beyond the reach of either accidental or intentional mis-statement (*n*).[4]

§ 321. The conduct of the spouses toward the child is more trustworthy than their testimony on the question of his legitimacy. If they have uniformly acknowledged and behaved towards him as their own child, it will be hardly possible for any one, and especially for either of them, to prove him to be illegitimate (*o*); whereas it will be a strong circumstance of an opposite tendency that they have uniformly treated him as the bastard issue of the wife's paramour (*p*). The circumstance of the child having been uniformly treated by the mother and her paramour as the fruit of their connection is of great importance (*r*). Of course the best evidence of this kind is where the

(*l*) Ersk., 1, 6, 49. (*m*) R. *v.* Reading, 1784, Lee's Ca. Temp. Hardwick, 79—Goodright *v.* Moss, 1777, 2 Cowp., 594—Cope *v.* Cope, 1833, 5 Car. and Pa., 604; 1 Mo. and Rob., 269, S. C.—Smith *v.* Chamberlaine, per Sir W. Wynne, Appx. to Gardner Peerage case, p. 370—R. *v.* Sourton, 1836, 5 Ad. and Ell., 180—2 Starkie, 200—Taylor, 642. But in England the husband and wife may be examined upon the date of the marriage, the birth of the child, and other matters not involving evidence of non-access; same authorities. (*n*) See Innes *v.* Innes, 1837, 2 Sh. and M'L., 453—Douglas cause, 1769, 2 Pat. Ap. Ca., 143—2 Fraser, 7. This was the rule in the Roman law; Dig., L. 25, 3, 5, § 8—ib., L. 28, 2, 14, § 2. (*o*) Per L. Chancellor Cottenham in Morris *v.* Davies, 1837, 5 Cl. and Fin., 242, 246—Le Marchant's preface (p. xviii) to report of Gardner Peerage case. (*p*) Townsend Peerage case, 1843, 75 Journ. H. of Lords, 181, *et seq.*—Gardner Peerage case, p. 338—Banbury Peerage case, Appx. to ib.—Morris *v.* Davies, *supra*—compared with Routledge *v.* Carruthers, 19th May 1812, F. C., Buchanan's Rep., 121; affd., 2 Bligh, 692—Bankt., 1, 2, 3. (*r*) It formed a main branch of the Townsend Peerage case, where the presumption *pater est*, &c., was

[4] See Walker *v.* Walker, *supra*, § 313, note 1, and Mackay *v.* Mackay, *supra*, § 319, note *.

conduct of both the spouses and of the paramour shows that they all regarded the child as the fruit of the illicit intercourse. Accordingly, Lord Chancellor Cottenham observed with regard to certain evidence of this nature, "These are the unequivocal acts of the only three persons who could have what may be called knowledge of who was the father of the child, all concurring in this, that he was not the child of Mr Morris (the husband). Can the conduct of any one of the three be reconciled with the supposition that it was his child, or could possibly be his?" (*s*)

§ 322. The declarations of these parties will consequently be admitted when they form part of their conduct, as their speaking to and about the child as legitimate or the reverse, or (as happened in one case) where the husband reproached his wife with having given birth to the child (*t*). But a line ought to be drawn between such evidence and hearsay of independent verbal statements of these parties; which should not be received indiscriminately while the persons who emitted them are alive; because, in that case, they ought to be examined as witnesses (*u*).

§ 323. The circumstance that the mother concealed the birth from her husband leads strongly to the inference that the child is illegitimate (*w*). In England the presumption of legitimacy does not apply where the spouses lived apart under a divorce *a mensa et thoro;* since law presumes that they obeyed the decree of the Court which separated them (*x*). This rule has not been recognised in Scotland (*y*). In neither country does a voluntary contract of separation exclude the presumption; although, of course, it may be an important circumstance in a proof of bastardy.

§ 324. The presumption *patrem esse*, &c., is strengthened by the circumstance that the child possessed the *status* of legitimacy, and that his opponent wittingly delayed to challenge it (*z*). And, on the other hand, the circumstance that the child accepted letters of legitimation from the Crown was held to be prejudicial to his right (*a*).

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held to be overcome; see 75 Journ. H. of Lords, 201, *et seq.*—See also Innes *v.* Innes, *supra*—Morris *v.* Davies, *supra.* (*s*) Morris *v.* Davies, *supra.* (*t*) Morris *v.* Davies, *supra.* (*u*) *Supra*, § 84, 92. This view is favoured by the observations of the Lord Chancellor in the Gardner Peerage case (p. 333) and Sir W. Wynne in Smythe *v.* Chamberlayne, 1792, Appx. to ib., 370. But see Innes *v.* Innes, *supra*—Morris *v.* Davies, *supra.* (*w*) See Banbury Peerage case and Morris *v.* Davies, *supra*; in both of which this circumstance occurred. See also 2 Fraser, 7—Code Civil, § 313—2 Touiller, 125. (*x*) Bull, N. P., 112—Best on Presumptions, 71—Taylor, 92—St George *v.* St Margaret, 1 Salk., 123. (*y*) Bell's Pr., § 1626. (*z*) Stair, 3, 3, 42—Cases in Mor., 12,635, 6, 7—2 Fraser, 8. (*a*) L. Advocate *v.* Craw, 1669, M., 2748.

§ 325. Important evidence may be derived from the *ventris inspectio*, especially where a widow states that she is pregnant of a posthumous child (*b*). The result of an extrajudicial inspection has therefore been admitted (*c*). But it is believed that the Court cannot order the examination (*d*).[5]

§ 326. A slighter proof will suffice to overcome the presumption *pater est quem nuptiae demonstrant* in an action against the alleged paramour for aliment of the child, than in a proper question of the child's *status;* and, if the Court find the paramour liable in aliment, they will reserve entire the question of *status* as regards the child (*e*).

CHAPTER IV.—OF PRESUMPTIONS FROM POSSESSION.

§ 327. As corporeal moveables are transferred by every species of alienation without a written title, the possessor of them is presumed to be the proprietor (*a*). This presumption may be overcome by proof *prout de jure.* When the proof is by witnesses, it must not only show that the moveables once belonged to the person seeking to recover them, but that his possession terminated in such a way that the subsequent possessor could not have acquired a right of property in them (*b*). "If I have a watch, it is not relevant for the

(*b*) Dig., L. 25, 4. In England the heir of a deceased proprietor may force the widow to undergo inspection, if she asserts that she is pregnant; 1 Blackst. (Stewart's 23d ed.), 570—Macpherson on Infants, 568. (*c*) Jobson *v.* Reid, 1832, 10 S., 594; 7 F. C., 456, S. C. (*d*) It was ordered in Ross *v.* Gray, 1669, M., 16,455, where there was strong ground for suspecting the widow's virtue. But see De Grosberg, 1765, M., 16,456, and L. Advocate *v.* Foulden, 1782, M., 16,456. The statute 2 Rob. I, cap. 25, requires a woman, who pleads pregnancy in suspension of punishment, to undergo inspection. (*e*) Reid *v.* Jobson, *supra*—Dig., L. 25, 3, 5, § 8, 9.

(*a*) Stair, 2, 1, 42—ib., 3, 2, 7—ib., 4, 30, 9—Ersk., 2, 1, 24—Bell's Pr., § 1314—More, 150—Tait, 307, 483. Accordingly, a person living in the house with another is presumed to be the proprietor of money and clothes, &c. kept in a chest which belongs to that other person, but of which the lodger keeps the key; Taylor *v.* Ranken, 1675, M., 9118. (*b*) Authorities in note (*a*)—Scott *v.* Fletcher, 1665, M., 11,616—Scott *v.* Elliot, 1672, M., 12,727—Geddes *v.* Geddes, 1678, M., 12,730—Forsyth *v.* Kilpatrick, 1680, M., 9120—Wilson *v.* Tours, 1680, M., 11,090—Russell *v.* Campbell, 1699 (Fount.), 4 B. Sup., 468—Ferguson *v.* Officers of State, 1749, M., 11,618.

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[5] It is thought that the Court may, in certain cases, competently make such an order when the woman is a party to the suit; but not when she is not, except in the case of a criminal prosecution; Davidson *v.* Davidson, 1860, 22 D., 749.

watchmaker to say, I offer to prove that the watch was mine last week, to give him *rei vindicationem;* but he must prove *quomodo desiit possidere*, else it is presumed to be mine who now have it; for the dominion of moveables transmits without writ, and ofttimes without any witnesses present, and therefore, ere you can recover them, you must first prove that you lost the possession *clam, vi*, or *precario*, or by some title not alienative of the property, as loan, or the like" (*c*). This rule applies not only to those smaller articles which pass from hand to hand, but even to an article of considerable bulk, as a thrashing mill. Accordingly, where a tenant had been removed under a declarator of irritancy and decree of removing, and on his removal greatly in arrear of rent the landlord took possession of the thrashing mill on the farm, and sold it to the incoming tenant, by whom it was possessed without challenge for five years; a creditor of the old tenant having attempted to carry off the mill by a poinding, the Court sustained the possession as sufficient to presume ownership, and refused to require the landlord (who was a party to the action) to prove an alleged contract with the former tenant, under which he took the mill in part payment of the arrears of rent (*d*).[1]

§ 328. The presumption may also be overcome by contrary inferences from the facts of the case, as by proof that the possessor is a carrier or shipper of goods (*e*), or is the servant or agent of the party who seeks to recover the goods, and who is a dealer in goods of the kind (*f*). So an executor seeking to recover moveables alleged to have belonged to his ancestor, will overcome the presumption arising from possession, if he proves that the goods were *in bonis defuncti* at his death; which is fairly held to throw the burden of proving a just title on the party who subsequently acquired them (*g*). And where a widow, having continued in possession of her husband's moveables, entered into a second marriage, her children by her first husband were preferred in a claim for those articles

(*c*) Russell *v.* Campbell, *supra.* (*d*) Sharpe *v.* Smith, 1832, 11 S., 38.
(*e*) Warrander *v.* Thomsons, 1710, M., 10,609—Tait, 486. (*f*) Cullen *v.* Stewart, 1833, 11 S., 733—Turner *v.* Gibb and M'Donald, 1830, 4 W. S., 154, affirming 5 S., 358. (*g*) Inglis *v.* Inglis, 1670, M., 12,727—Semple *v.* Givan, 1672, M., 12,117—Hume *v.* Livingstone, 1678, Mor. Sup. (Stair's Decisions), p. 81—Stair, 3, 2, 7.

[1] Possession of a ship, and consequent right to the freight, cannot be acquired by a mortgagee, by intimation of his mortgage, or by mere intimation that he takes possession. He must take possession by some overt act; such, for example, as putting a man on board; Duncan *v.* Don, 1861, 23 D., 544—Cato *v.* Irving, 5 De Gex and Smale, 210.

which were proved to have belonged to their father at his death (*h*). In one case the following facts appeared—Cunningham gave Aitkenhead the custody of curious jewels of considerable value, conform to inventory under the depositor's hand. He then left the country, drew bills on Aitkenhead, and died abroad. Aitkenhead transferred the bills and the custody of the jewels to Ramsay, taking from him and Byres a bond to make them furthcoming. Ramsay having hid the jewels in his cellar, Byres got access to them unauthorisedly, removed them, and pledged some of them to Wilson. In a competition between Wilson and Ramsay (who had become Cunningham's executor), the presumption arising from Byres' possession was held to be overcome by the original subscribed inventory, a letter from Byres dated before the impignoration admitting the jewels to be Cunningham's, and proof that Byres had broken into the cellar, combined with the fact that he was not a dealer in such wares, and that the jewels were not suitable to his quality as articles for personal use. These circumstances were held not only to prove that Byres was not the proprietor of the jewels, but also to exclude Wilson's plea that he had *in bona fide* trusted Byres as such (*i*). On the other hand, where a creditor of one who was an undischarged bankrupt (although the sequestration had practically terminated), poinded the bankrupt's household furniture, whereupon another person claimed it, stating that it had been purchased by him at an appraised value and left with the bankrupt, from motives of friendship to him and his family, and where the furniture had never been removed from the bankrupt's house, but had been possessed and used by him as his own for six years, it was held that the presumption arising from possession was not overcome by the circumstances of the bankruptcy and the original purchase by the bankrupt's friend, and that, as that party had failed to prove a loan or hire by him to the bankrupt, the latter must be presumed to be proprietor (*k*). Lord Moncreiff and Lord (Ordinary) Ivory, holding that the presumption of the bankrupt being proprietor was overcome, treated the case as one of reputed ownership, and held that the bankrupt's possession did not in the circumstances raise such a repute. But the case was decided independently of that doctrine.

§ 329. The principle last referred to (which is a rule of mercantile law, not of evidence) is thus stated by Mr Bell (*l*): "Where

(*h*) Abercromby *v.* Story, 1687, M., 11,618. (*i*) Ramsay *v.* Wilson, 1666, M., 9113—See also Pringles *v.* Gribton, 1710, M., 9123. (*k*) Anderson *v.* Buchanan, 1848, 11 D., 270. With this case compare Fife *v.* Woodman, 1841, 4 D., 255. (*l*) 1 Bell's Com., 250.

one is unnecessarily or by the collusion or gross negligence of the true owner permitted to give himself an appearance to the world as if he were proprietor of goods and wares not belonging to himself, and this by exercising acts of ownership, and by holding a possession seemingly uncontrolled; his creditors will be entitled to proceed against the goods as if they really belonged to him." The foundation of the rule is fraud or collusion, or at least neglect, in the proprietor of goods, in allowing another person to have that possession of them which warrants persons unacquainted with the latent right to give him credit (*m*). When the goods originally belonged to the person left in possession of them, by whom they were sold without being delivered to the true owner, the right of the latter will fail in competition with the creditors of the former, on the additional ground that *traditionibus, non nudis pactis, dominia rerum transferuntur.*[2]

(*m*) 1 Bell's Com., 250 (3), *et seq.*—Stair, 1, 9, 11—Bell's Pr., § 1315, 6—Per L. Moncreiff in Anderson *v.* Buchanan, *supra.* The following cases have occurred on questions of reputed ownership; Carse *v.* Halyburton, 1714, M., 9125—Breichan *v.* Muirhead, 1810, Hume D., 215—Cargill *v.* Somerville, 1820, ib., 228—M'Millan *v.* Price, 1837, 15 S., 916—M'Dougal *v.* Whitelaw, 1840, 2 D., 500—Fife *v.* Woodman, 1841, 4 D., 255—Shearer *v.* Christie, 1842, 5 D., 132—Campbell *v.* Stewart, 1848, 10 D., 1280—Brown *v.* Fleming, 1850, 13 D., 378.

[2] The principle of the common law, that undelivered goods remain the property of the seller, is untouched by the Mercantile Amendment Act, 19 and 20 Vict., c. 60, and the practical consequences of the principle remain unimpaired, except so far as expressly taken away or modified by the Act; Wyper *v.* Harvey 1861, 23 D., 606. The Act provides, § 1, that where goods have been sold, but have not been delivered, and have been allowed to remain in the custody of the seller, no creditor of the seller shall attach the goods, to the effect of preventing the purchaser or others in his right from enforcing delivery of them. It has been held that the case of a horse sold and left with the seller, who was authorised to take the use of it and to sell it on behalf of the purchaser, did not fall within this clause; because goods of which the seller was allowed the use, and which he had power to resell, were not, in the sense of the Act, "goods left in the custody of the seller,"—the right of custody not implying right to use or sell; Sim *v.* Grant, 1862, 24 D., 1033.

"The law requires, in cases of civil or constructive delivery, the same description and extent of possession which was formerly in the seller to be, after the sale, vested in the purchaser;" Lord President Blair in Broughton *v.* Aitcheson, 15th November 1819, F. C. In a recent case, where spirits sold by a distiller and paid for, the sale being entered in the distiller's books, were allowed to remain in a warehouse in the distillery, to which the distiller had one key and the excise officers another, the spirits were held not to be transferred to the purchaser, but to form part of the sequestrated estate of the seller; Mathison *v.* Alison, 23d December 1854, 17 D., 274. A keeper of a bonded warehouse who receives spirits from a distiller, receives them in deposit to hold for the distiller, not to deliver to the purchaser; and a keeper of a bonded warehouse was held not entitled, without an order from the distiller, to make delivery to a pur-

§ 330. When the possessor of a moveable does not claim the property of it, but some inferior right, *e.g.*, of pledge, to which the possession may be attributed, his admission that he is not proprietor will not throw on him the burden of proving such inferior title; but the admission will be taken with its qualification (*n*). Accordingly, where a party when sued for delivery of certain articles admitted that they were not his property, but stated that they had been pledged by the pursuer's wife for a debt due by her and the pursuer, of which debt she had no proof except an irregular account-book, and where the alleged proprietor had no proof besides the qualified admission, the Court found that the possessor was not obliged to give up the articles except on payment of his debt (*o*).

§ 331. In regard to heritage the general rule applies, that *in pari casu melior est conditio possidentis* (*p*). Under the Act 1617, c. 12, which establishes an absolute right of property in one who has possessed heritage uninterruptedly for forty years "following and ensuing" the date of his infeftment, it is enough for the party to prove possession as far back as the memory of man can reach, whereupon law will presume that it existed from the date of the right (*r*).[3]

Possession by a churchman for thirteen years of any subject as part of the benefice, creates a presumptive title in his favour, under the maxim of the canonists *decennalis et triennalis possessor non tenetur docere de titulo* (*s*). The rule arises from the risk of loss under which the titles of churchmen lie, in consequence of the frequent change of incumbents. It is not of the nature of a prescription, but is merely a presumption which may be rebutted, as by the terms of the titles showing that the incumbent has been possessing beyond his right (*t*). The presumption, being intended to supply the want of

(*n*) See *infra*, chapter on implied admissions. (*o*) Hariot *v.* Cunningham, 1791, M., 12,405—More, 151. (*p*) Ersk., 2, 1, 24. (*r*) Ersk., 3, 7, 3—Tait., 486. (*s*) Stair, 2, 8, 29—Ersk., 3, 7, 33—More's Notes, 147.

(*t*) Ersk., *supra*—E. Wigtown *v.* Gray, 1622, M., 10,998—Bishop of Dunblane *v.* Kinloch, 1676, M., 7950—Ramsay *v.* Kinloch, 1676, 3 Br. Sup., 137—Barclay *v.* College of

chaser, though the name of the purchaser was marked by the seller on the casks when they were sent; Smith *v.* Allan and Poynter, 1859, 22 D., 208—Melrose *v.* Hastie, 1851, 13 D., 880—Lord President Blair's judgment in Broughton *v.* Aitchison, *supra*.

A sale by auction, under a levy warrant for payment of excise duties, was held not to divest the owner of goods which were sold but allowed to remain in his possession; M'Arthur *v.* Brown, 1858, 20 D., 1232.

[3] Registration of long leases, *i.e.*, of leases for thirty-one years and upwards is equivalent to possession; 20 and 21 Vict., c. 20, § 16.

written titles, would probably not be extended to rights to vicarage teinds, which are constituted by usage, not by writing (*u*). The presumption is good, not only to the incumbent at the time, but to all his successors, each being entitled to found on the possession of previous incumbents (*x*).

The Court of Session passed an Act of Sederunt on 16th December 1612, by which they declared that in time to come they would decide all questions with regard to church lands and livings pertaining to churchmen, by their possession for thirty years immediately preceding the suit concerning them (*y*).[4]

§ 332. Possession by the public of a road as a public road for forty years, or beyond the memory of man, raises a presumption that they have a right of way along it (*z*), arising from a grant or dedication, either express or implied (*a*).[5] This presumption is al-

St Andrews, 1684, M., 11,001—Graham *v.* Ogilvy, 1862, M., 7955—Rule's Reps. *v.* Magistrates of Stirling, 1708, M., 11,002—Greig *v.* D. Queensberry, 21st November 1809, F. C. (*u*) Ersk., 3, 7, 34. (*x*) Ersk., ib. On this subject see Connell on Parishes, 439, *et seq.* (*y*) Ersk., 3, 7, 34—E. Home *v.* L. Buccleugh, 1612, M., 10,998. (*z*) Rogers *v.* Harvie, 1833, 5 S., 917, and 4 Mur., 25; affd., 3 W. S., 251—Crawford *v.* Menzies, 1849, 11 D., 1127—D. Athole *v.* Torrie (Glentilt case), 1852, 12 D., 327; affd., 1 Macq., 65—Cuthbertson *v.* Young, 1851, 14 D., 301; affd., March 1854—Campbell *v.* Lang, 1851, 13 D., 1179; affd., 6th May 1853.

(*a*) Napier's Tr. *v.* Morrison, 1851, 13 D., 1404, especially L. Just.-Clerk Hope's opinion—D. Athole *v.* Torrie, *supra*, per L. Chancellor St Leonards, 1 Macq., 77—See also Dyce *v.* L. James Hay, 1852, per eund., 1 Macq., 311—Campbell *v.* Wilson, 1802, 3 East., 294—R. *v.* Benedict, 1821, 4 B. and Ald., 547. But see *contra*, Cuming *v.* Smollett, 1852, 14 D., 885.

[4] The title acquired by a minister of a parish, by possession for thirteen years of land or other subjects as part of his benefice, is a presumptive title only, and the presumption may be displaced by proof that the possession was on some other footing than of property. The title is presumed from and depends on the possession; but possession for thirteen years of a subject as part of a church benefice, will support not only a possessory but also a declaratory action; and a decree following on it and giving effect to it, would, it is thought, amount to an active and permanent written title in favour of the incumbent, by which possession might be recovered after having been lost. But the title acquired by possession alone, if not supported by a decree, is a title merely to defend, not to acquire or recover possession; it is not of such permanent character as to survive the loss of possession. So, when a piece of land which, prior to 1814, had been possessed for more than thirteen years as part of a church benefice, ceased then to be so possessed, it was held that the minister of the parish had not, in 1856, a title to recover possession; during part of the interval between 1814 and 1856 the piece of land had lain unoccupied, but latterly it had been possessed by others; Cochrane *v.* Smith, 1859, 22 D., 252.

The opinions in the case of Cochrane *v.* Smith seem to proceed on a rejection of the Act of Sederunt, as either not applicable to a question about the right to a benefice, or as not in force.

[5] Magistrates of Elgin *v.* Robertson, 1862, 24 D., 301, *ante*, § 293, note 1.

most always sufficiently strong to establish the right. But it is not necessarily conclusive; and it may therefore be overcome by contrary inferences, *e.g.*, where the road is through a private policy, or where it had been made shortly before the commencement of the prescriptive period as a private avenue (*b*), or as a road to a private quarry (*c*). The reason is, that as it cannot fairly be presumed that a proprietor by allowing persons to pass along a road of such a private character intended to create an absolute and perpetual public right along it, the possession will be attributed to sufferance during his pleasure, and not to constructive or implied grant of public way (*d*). In this respect, therefore, a public right of way differs from a servitude of road. While the former depends upon grant express or presumed, the latter may arise either from grant or from positive prescription, the sasine of the dominant proprietor combined with forty years' possession creating an indefeasible right not only to the subjects specially described, but also to those privileges which are accessory and tributary to them, among which servitudes of way are included (*e*).[6]

§ 333. The immemorial exercise of corporation privileges raises a presumption that the body which has enjoyed them had been constituted a corporation (*f*).

§ 334. It is often said that recent possession of stolen goods raises a presumption that the possessor is the thief, so as to lay on him the burden of proving that he acquired them honestly. But possession may arise from so many causes reconcileable with innocence—*e.g.*, *bona fide* purchase from the thief, transfer of the possession by him in order to escape detection (*g*)—that no such general rule ought to be laid down. Baron Hume accordingly observes (*h*)—"That recent possession shall in every case be sufficient

(*b*) Napier's Tr. *v.* Morrison, *supra*—Campbell *v.* Wilson, *supra*—R. *v.* Benedict, *supra*—See also Purdie *v.* Steil, 1749, M., 14,511. (*c*) Ker *v.* Hamilton, 1823, 2 S., 149, Session Papers. (*d*) Authorities in two preceding notes.

(*e*) Stair, 2, 7, 2—Ersk., 2, 7, 3—Mackenzie, Inst., 2, 9, 11 (Works, vol. ii, p. 306)—Bell's Pr., § 993—Beaumont *v.* L. Glenlyon, 1843, 5 D., 1337, and cases there cited—Liston *v.* Galloway, 1835, 2 Bell's Illust., 129—Dunse *v.* Hay, 1732, M., 1824.

(*f*) Ivory's Ersk., 214, note 260—Wrights of Glasgow *v.* Cross, 1765, M., 1961—Begbie *v.* Brown, 1766, M., 7709—Skirving *v.* Smellie, 1803, M., 10,921—See also Society of Solicitors *v.* Writers to the Signet, 1800, M., Appx. College of Justice, No. 1—Graham *v.* Writers to the Signet, 1825, 1 W. S., 538. (*g*) See *supra*, § 256.

(*h*) 1 Hume, 111.

[6] As to the difference between a public and a servitude road see Thomson *v.* Murdoch and others, 1862, 24 D., 975—Carsen, Warren, & Co. *v.* Miller, 13th March 1863, 25 D.

to convict, would be too broad a position. Like that of other circumstances, its weight may be greater or less according to the relative particulars of the story. But generally it seems to be true that if the panel is found in possession recently after the thing has been stolen, in which case it is unlikely that he should have got it otherwise than by stealing, this is always a strong ingredient of evidence, and such as, with the aid of any other material circumstance, will and ought to be held a relevant ground of conviction." The weight of the circumstance depends upon the nature of the articles stolen, and the condition or occupation of the possessor; and such circumstances have also an important bearing upon the time over which the suspicion of guilt should run. For example, the possession within a few hours after theft of articles which pass rapidly from hand to hand would hardly raise a probability of guilt, while it is otherwise as to the possession at the distance of days and even weeks of a bulky commodity, *e.g.*, a herd of cattle, or a boat, or even a large quantity of trifling articles which had been stolen *en masse* (*i*).

CHAPTER V.—OF THE PRESUMPTION OF ONEROSITY OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

§ 335. Law recognises a strong presumption that bills of exchange and promissory notes are onerous transactions in regard to all the persons interested in them, and in general this presumption can only be overcome by the writ or oath on reference of the creditor in the bill. This presumption springs from the ordinary course of business; and it is a favourite of the law, partly from its advantage to trade in enabling bills to pass from hand to hand as bags of money, partly from its preventing frivolous objections and prolonged investigations being started to stop diligence on bills, and because the proper legal construction of these writings ought not to be controlled by parole evidence. The presumption of onerosity will be considered, 1st, as between the drawer and acceptor of the bill; 2d, as between the drawer and payee; and, 3d, as between

(*i*) See on this Hume, *supra*—Burnett, 555—1 Al., 320—Best on Presumption, 304—Taylor, 102. See *supra*, § 283, 284.

the indorsee or holder and the person from whom the right wa
rived.

As promissory notes are subject to the same rules as bills,
will in the following paragraphs be included under that ge
term.

I. *Presumption of Onerosity as between the Drawer and Accep*

§ 336. The acceptor of a bill is presumed to have receive
his acceptance a valuable consideration from the drawer; a
general this presumption can only be overcome by the dra
writ or oath (*a*).[1] This rule holds not only in the common ca
an action at the instance of the drawer or indorsee against th
ceptor, but also when the drawer in an action against him b
indorsee pleads want of notification of dishonour, and is met b
allegation that the bill was accepted for his own accommoda
In a case of this nature the Court held that the averment of
onerosity could only be proved by the drawer's writ or oat
And where an indorsee suing the acceptor of a bill admits th
is trustee for the drawer; the acceptor's defence of non-oner
can only be proved by the drawer's writ or oath (*c*).

§ 337. When there are several acceptors, all are presum
be on an equal footing with regard to onerosity; and, there
when one acceptor, having paid the bill, sued his co-acceptor
relief *pro rata*, it was held that their defence, that they acc
for his accommodation, could only be proved by his writ or oath

§ 338. Mr Erskine holds that when a bill does not bear

(*a*) Ersk., 3, 2, 29—Tait, 474—Thomson on Bills, 86—Jaffray *v.* Robertson
M., 12,337—M'Donell *v.* Donaldson, 1825, 4 S., 87—Peat *v.* Wilson, 1827, 6 S.,
Bennet *v.* Burgess, 1828, 6 S., 854—Jamieson *v.* Graham, 1832, 11 S., 80—Co
Stalker, 1849, 12 D., 169—Cargill *v.* Gould & Co., 1852, 14 D., 485. The consid
does not require to be present value; Moffat *v.* M'Kenzie, 1822, 2 S., 75. S
Stewart *v.* Wylie, 1849, 11 D., 1123—Kidstone *v.* Stead, 21st Jan. 1809, F.C.—W
v. Barrie, 1793, M., 1484. (*b*) Whyte *v.* Finlay, 1831, 9 S., 304.

(*c*) Jameson *v.* Grahame, 1832, 11 S., 80—Innes *v.* Lawson, 1828, 6 S., 513.

(*d*) Laing *v.* Anderson, 1827, 5 S., 851.

[1] "Proof by writ *or* oath does not mean a proof by writ *and* oath. If the de
fail to prove his defence by writ, he may have recourse to proof by oath; bu
then confined to the oath as his only evidence, the reference to oath being a j
contract that the case is to be determined by what his adversary shall depone"
Justice-Clerk Inglis, in Gordon *v.* Pratt, 1860, 22 D., 907.

for value, the acceptor is presumed not to be the drawer's debtor (*e*). But this doctrine has been questioned (*f*); and it cannot be reconciled with two cases where onerosity was presumed, although the value set forth was admitted to be untrue (*g*). An acceptor who wishes to exclude the presumption, may do so by accepting "for honour" (*h*). Again, where the drawer of a bill, alleging that he had joined the acceptors in it for the accommodation of a third party (whose name was not on the bill), sued them for relief of their proportion of the contents, it was held that their allegation, that they accepted for the accommodation of the pursuer and his brother, could only be proved by the pursuer's writ or oath (*i*). Lord Ordinary Fullerton, whose judgment was adhered to in the Inner House, observed in this case that "the principle which seems to be adopted, and, as it appears to the Lord Ordinary, justly adopted in such cases, is, that among the parties to a bill, whether an accommodation bill or not, the liabilities created *ex facie* of the document must receive effect, unless taken off by the writ or oath of the apparent creditor."[3]

(*e*) Ersk., 3, 2, 30, citing Cunningham *v.* Agnew, 1711, M., 1531.

(*f*) Ivory's Ersk., p. 626, note, 73—Thomson, 89—Tait, 474. (*g*) In Wallaces *v.* Barrie, 1793, M., 1484, where the bill bore to be for "value received in flax," and the acceptor alleged that it was an accommodation bill for the drawer's behoof, the Court held that the admission did not annul the bill, and that, notwithstanding of it, value was to be presumed. It was observed on the bench, without qualification, that "the law presumes that the acceptor gets value for the bill; and this presumption can only be taken off by writ or oath of party."[2] In Winton *v.* Gibson, 1831, 9 S., 662, where the bill bore to be for value in plumber work, and the acceptor alleged that it was for the drawer's accommodation, it was held that the presumption of value was not done away by the admission that the particular value set forth was untrue. See also Malcolm *v.* Ballendene, 1835, 13 S., 1021. (*h*) Ersk., 3, 2, 30—Tait, 474.

(*i*) M'Gregor *v.* Gibson, 1831, 9 S., 483. Lord Glenlee observed—"All that is referred to the pursuer's oath is the nature of the transaction; but it will still be open to prove *aliunde* on the merits as to payment that the pursuer never gave the money to Wardlaw," the third party for whose accommodation the bill was alleged to have been made.

[2] The admission of the drawer was, that the acceptance was not for value when it was granted; but he stated that he had discounted the bill and handed the proceeds to the acceptor.

[3] In a suspension by the acceptor of a bill of a charge by the drawer, the charger stated that he and the suspender had entered into a joint adventure, that the bill had been made to raise money for the adventure, that he (the charger) discounted the bill, employed the proceeds in the joint adventure, and afterwards retired the bill; that the joint adventure had resulted in loss, and the suspender's share of the loss was a certain sum less than the sum in the bill, to which the drawer restricted the charge. The defender denied the joint adventure, and alleged that the bill was for the accommodation of the drawer. The majority of the Court held that the drawer's statement showed that

§ 339. Where a bill bears to be for "value in account," value is not presumed; and the question whether it has been g depends on the result of an investigation into the state of acco between the drawer and acceptor (*k*). This is also the rule v it appears from the drawer's writ or oath that the value was in count (*l*).

§ 340. As the presumption that bills are onerous is desig for the benefit of trade, and the protection of genuine and *bona* transactions, it yields whenever the manifest or admitted show that the transaction was not onerous (*m*). What course then be followed depends on the strength of the *prima facie* against onerosity. If it is clear, the Court may at once give e to it (*n*); whereas if it leaves the question doubtful, they will a

(*k*) Wightman *v.* Johnston, 1700, 4 Sup., 477—Wightman *v.* Moncur, 1701, ib —Wilson *v.* Loder, 1848, 10 D., 560. It was here held that "value in account" as between the drawer and acceptor, and not as between the drawer and payee. pare this case with Forbes *v.* Fonnereau, 1741, Elch., "Bill," No. 24 M., 147 Cheine *v.* Western Bank, 1848, 10 D., 1523. See Thomson, 92.

(*l*) Carruthers *v.* Johnstone, 1830, 8 S., 957—Donaldson *v.* M'Donell, 28th Ja 1826, F. C. See also Young *v.* Sheridan, 1837, 15 S., 664—Fortune *v.* Luke, 18 S., 115—Pershard *v.* Brackenbridge, 1793, M., 1523.

(*m*) See the cases on the presumption in favour of onerous indorsees, *infra*.

(*n*) Thus where a person in prison, in order to obtain his liberation, had ac renewals of bills which included not only the original bills, but also sums whi charger said were due as the expense of diligence on them, which sums had no properly liquidated, diligence on these bills was suspended without caution or con tion; M'Lauchlans *v.* Campbell, 1821, 1 S., 172. In the year 1838 a party sue trustees of his son (who had died in December 1834), for payment of a bill for bearing to be for value received, payable two months after its date of 20th July and signed by the son as acceptor. The defenders founded on the following which were all either admitted or proved. In 1822 the son succeeded to an which the father managed till the son's majority in 1828. In 1830 the father w questrated, and the son claimed on his estate as a creditor for £800, which the explained to be the balance due on his intromissions; but this claim was not paid October 1831 the father was imprisoned for debt, and afterwards obtained the b of the act of grace on taking the usual oath, when he made no reference to any against the son. He was liberated in March 1832, on the incarcerating creditor f to aliment him. In August 1834 (two years after the date of the bill libelled o sued his son for aliment, representing himself to be in destitution, but making no sion to the bill; and in that action he was admitted to the benefit of the poor's r the ground that he had no funds of his own. These facts the Court, although difficulty, held to be sufficient to overcome the presumption of onerosity, and th

the bill did not prove what debt, if any, was owing by the suspender, and they di investigation. Lord Deas thought that the bill should receive effect, except so it was qualified and restricted by the charger's admissions; Blackwood *v.* Hay, 20 D., 631.

a proof *prout de jure* of non-onerosity (*o*). Sometimes they only allow such a proof "before answer" (*p*). When the transaction appears to be merely irregular, without there being ground to suspect *mala fides* or non-onerosity, the ordinary rule will be applied (*r*); and if a proof which has been allowed comes up merely to suspicion, and not to full proof, the acceptor must fall back on the drawer's writ or oath (*s*).[4]

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cordingly assoilzied the trustees; Burns *v.* Burns, 1841, 3 D., 1273. See also M'Ewan *v.* Graham, 1833, 12 S., 110 (noticed on the bench in M'Lachlans *v.* Campbell, *supra*), where the Court, being satisfied from ocular inspection that a name had been erased from below that of the apparent acceptor, refused action thereon against him. The admitted circumstances also seemed to be considered sufficient to show that the transaction was not *bona fide* and onerous. See also Carruthers *v.* Johnstone, 1830, 8 S., 957.

(*o*) Thus in M'Donald *v.* Langton and Others, 1836, 15 S., 303, where the indorsees charging on a bill had acquired it after the term of payment, and after it had been noted for non-payment, and where the acceptors having alleged that they were not debtors in the bill, and that the chargers were duly made aware of that fact, recovered writings which inferred, but did not conclusively prove, these averments, the Court allowed them a farther proof *prout de jure*, according to "the general rule to allow investigation by parole evidence, where there is reason to suspect unfair dealing as to bills of exchange." See this case noticed by Lord Justice-Clerk Boyle in Beveridge *v.* Henderson, *infra*.

(*p*) Thus where Beveridge and Colville had been on an intimate footing for a number of years, and had been mixed up together in a variety of bill transactions, and where a bill at four months drawn by Colville and accepted by Beveridge in August 1834, had been conveyed by Colville to Monro, discounted by Monro at a bank, paid and taken up by Monro on non-payment by the parties to it, and paid to Munro by the trustee on Colville's estate; and where Colville having died in 1837, without having claimed any part of the bill from Beveridge, Colville's representatives, in 1841, charged Beveridge for payment, and Beveridge suspended on the ground (*inter alia*) that the bill had been granted for Colville's accommodation; the Court, in consideration of the circumstances, allowed a proof before answer of certain allegations by Beveridge, which, if true, showed that Colville had been the real debtor in the bill; Beveridge *v.* Henderson, 1841, 4 D., 87. See other instances in which the Court followed this practice; Crichton *v.* Watt, 1831, 9 S., 516—Little *v.* Smith, 1845, 8 D., 265—Pentland *v.* Bell, 1822, 1 S., 426. See also Borthwick *v.* Bremner, 1833, 11 S., 716.

(*r*) As in Winton *v.* Gibson, 1831, 9 S., 662—Wallaces *v.* Barrie, 1793, M., 1484—M'Gregor *v.* Gibson, 1831, 9 S., 483—See also Malcolm *v.* Ballendene, 1835, 13 S., 1021.

(*s*) Little *v.* Smith, 1847, 9 D., 763. See Berry *v.* Murdoch, 1822, 1 S., 364.

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[4] Macleans *v.* Smith, 1855, 17 D., 950—York *v.* Gossman, 1861, 23 D., 1245—M'Alister *v.* Gemmil, 1862, 24 D., 956; affd., March 1863, *supra*, § 121, note 12. Inquiry was allowed where the acceptor of a bill alleged that at a sale of farm stock he had made a purchase, and accepted a blank bill drawn by the pursuer, who managed the sale, on the understanding that the blank was to be filled up with the price of what he had purchased, which was far less than the sum with which the drawer had filled up the blank in the bill. The pursuer admitted that the bill was blank when it was

§ 341. In one case, where a claim for payment of two bills in the course of an accounting between the drawer and acce and where the circumstances attending the bills were strongl dicative of their having been granted without value, the Cou quired the drawer, before answer, to give in a condescenden the value which he alleged he had given for them (*t*). This advisable course when the circumstances are strong enough t lieve the drawer from the burden of proof, although not suffi to substantiate the averment of non-onerosity.[5]

§ 342. When the acceptor makes specific averments of wa value, and offers to prove them from the drawer's books, the generally sist diligence on the bill until the books shall have examined (*u*). Thus where a promissory note had been grante Hynde to his partner Berry, had been discounted by Berry duly retired by Hynde; and where Berry, being sued for the an by the trustee on Hynde's sequestrated estate, admitted tha bill had been an accommodation bill, and that he had disco it, but added that it had been for Hynde's accommodation, to v he had accordingly paid the proceeds, the Lord Ordinary, afte mitting to an accountant to examine the books of the partie soilzied Berry; and the Court adhered to the judgment (*x*). where the acceptors of four bills, on being sued by the dra alleged that they had accepted for the accommodation of the l by whom the bills had accordingly been retired, and wher acceptors raised a counter action of reduction on the grou fraud, the Court, before answer, remitted to an accountant to mine the books of both parties (*y*). On the other hand, wher

(*t*) Wilson *v.* Pollock, Gilmour, & Co., 1827, 6 S., 7. See also Eustace *v.* P 1776, Hailes, 130. (*u*) Berry *v.* Murdoch, 1822, 1 S., 328—See also Cu Monteath, 1825, 4 S., 164. (*x*) Berry *v.* Murdoch, *supra.*

(*y*) Pentland & Son *v.* Bell & Co., 1822, 1 S., 464. The drawer's books were to contain entries of two of the bills as for their accommodation; and the circum of the case, combined with the suspicious nature of the books, led the Court to all

signed, and that the acceptor had not made purchases to the extent of the sum bill, but he alleged that the acceptor had agreed to sign the bill as a security fo purchases, and had authorised the pursuer to fill up the blank with the sum in th which sum was covered by the stamp. However, the mere averment that a bill complete was blank when an acceptor signed it, would not of itself entitle the a to a proof *prout de jure;* Anderson *v.* Lorimer, 1857, 20 D., 74.

[5] This course was adopted in the case of Bannatyne *v.* Wilson, 1855, 18 D., which the acceptor of a bill resisted an action on the bill by the holder of it, ground that the bill had been an accommodation bill between the drawer and ac and that the charger was not an onerous *bona fide* holder. The circumstance thought to give rise to doubt as to the onerosity of the bill.

acceptor of a bill, being charged by a bank which was an indorsee of the drawer, alleged that he had accepted for the drawer's accommodation, and that the bank were not onerous and *bona fide* holders, and where he craved leave to prove the latter averment from the bank books, the Court held that the offer of proof was too vague; and they required the acceptor to prove his averment by reference to oath (*z*).

§ 343. But while proof by the drawer's books, as equivalent to his writ, may thus be allowed, whenever a specific case of non-onerosity is averred; and while the admitted or manifest circumstances may induce the Court to allow a proof of that fact *prout de jure;* it may be stated as an inflexible rule, that no unsupported allegations against the onerosity of a bill, however strongly and articulately they may be proponed, will obviate the presumption in question, or entitle the acceptor to any other proof than the drawer's writ or oath (*a*).

§ 344. This rule, however, only applies where the acceptor does not deny that the bill was duly signed by him. If his allegation strikes at the validity of the document as his writ, *e.g.*, where he avers that it is a forgery, or that it was impetrated from him by a fraudulent device, he will be allowed a proof at large, although he has no *prima facie* case on the admitted facts. This has been repeatedly held where the allegations were that the subscription had been forged (*b*).[6] So, a long trial ensued upon an issue whether the acceptor's signature had been fraudulently obtained to the bill when he was blind (*c*). And where M'Ilwham, the granter of a promissory note to Kerr, alleged that it had been impetrated from him by gross fraud and circumvention on the part of Kerr and his wife, a proof *prout de jure* was allowed, and established the allegation (*d*). In every case, indeed, the allegation that the bill had been obtained by fraud may be proved by parole evidence, provided the averment be sufficiently specific (*e*). It would seem that this

acceptor a proof *prout de jure* of their allegation against another of the bills. The conclusions of the summons did not apply to the fourth bill. (*z*) Monro *v.* Aytoun, 1822, 1 S., 338. (*a*) *Supra*, § 336, (*a*). (*b*) See *e.g.*, Gellatley *v.* Jones, 1851, 13 D., 961. (*c*) Campbell *v.* Ayr Bank, March 1854. (*d*) M'Ilwham *v.* Kerr, 1823, 2 S., 240. (*e*) Andrew *v.* Buik, 1821, 1 S., 80—Burns *v.* Burns, 1841, 3 D., 1273, per Lord Fullerton—Little *v.* Smith, 1845, 8 D., 265, per Lord Justice-Clerk; and 9 D., 762—compared with Goodfellow *v.* Madder, 1785, M., 1483; Hailes, 978, S. C.—Hunter *v.* George's Tr., 1834, 7 W. S., 339. See

[6] The onus being on the party impugning the signature.

only holds where the fraud alleged exists in the original conco of the bill, or in its acquisition by indorsation, and that the al tion of a fraudulent use of the bill will not suffice (*f*).[7]

§ 345. In cases laid upon the Act 1621, c. 18, for defe gratuitous alienations by insolvent persons, the rule is, that i challenger proves that the granter and grantee were in a conjun confident relation, he thereby transfers the *onus probandi;* w upon the party maintaining that the transaction is onerous prove that fact. Such is the rule in regard to deeds of alien and transference, which the grantee, if conjunct or confident t granter, must prove to be onerous, although they narrate an on consideration (*g*). The same principle holds as to bills, which not be presumed to have been accepted for an onerous considera if the drawer is conjunct or confident to the acceptor (*h*). An circumstance that a bill bears to be for "value received," seem to entitle the drawer, if a conjunct or confident party, to the sumption of onerosity (*i*). On the other hand, when the dr does not stand in any of the relations which law recognises as ing within these terms, the burden of proving that the bill is onerous lies on the party who challenges it (*k*). It may be a that the nullity which the Act 1621, c. 18, introduces, does affect bills granted by an insolvent debtor to conjunct or conf persons when these bills have passed into the hands of those have "purchased them by true bargains, for just and comp prices, or in satisfaction of their lawful debts, from the interp persons trusted by the said dyvours" or bankrupts.

§ 346. It has been held that a bill which had been grante

also Pentland & Son *v.* Bell & Co., 1822, 1 S., 464, *supra*, § 342—Farquhar *v.* 1757, M., 12,341—Eustace *v.* Pringle, 1776, Hailes, 130—and see *infra*, § 359, *et*

(*f*) See per L. Fullerton in Burns *v.* Burns, *supra*—and per L. Moncreiff in *v.* Smith, 9 D., 764—*contra* Lord Justice-Clerk (Hope) in S. C., 8 D., 269. See § 359, *et seq.* (*g*) Ersk., 4, 1, 35—2 Bell's Com., 191, *et seq.*—More, 61—Th on Bills, 678. (*h*) 2 Bell's Com., 189; ib., 192 (3), citing Belch, 24th Dec 1808, not rep.—Thomson, 679. (*i*) See authorities in note (*h*); but se *tra*, Wightman *v.* Moncur, 1701, 4 Sup., 497. (*k*) See Ersk., 4, 1, 35—2 191—More, 61. As to who are conjunct or confident persons, see 2 Bell, 187—Ed *v.* Grant, 1853, 15 D., 703.

[7] 19 and 20 Vict., c. 60, § 15, *infra*, § 359, note. An acceptor of a bill, in an on the bill by the drawer, was allowed to prove, *prout de jure*, that the charger ha cepted from the defender a sum of money for all the bills in his possession wit defender's name on them, and had fraudulently retained this particular bill; J Johnstone, 1860, 22 D., 430.

deathbed is not entitled to the presumption of onerosity when challenged by the acceptor's heir-at-law (*l*). But this decision may be questioned.

II. *Presumption of Onerosity as between Drawer and Payee.*

§ 347. Upon the grounds already noticed, the payee of a bill or note is presumed to have given an onerous consideration to the drawer (*m*). This holds although the bill was originally blank in the payee's name (*n*), and although it does not bear value as between him and the drawer (*o*). If, however, it bears to be for value in account as between them, full value is not presumed, but will depend on investigation (*p*). Where a bill was drawn thus, "Pay to order of A value in account as per advice from L" (who was the drawer), the Court held that it meant account as between the drawer and acceptor, not as between the drawer and payee, and, consequently, that it was liable to the presumption of full value as between the latter (*r*).

§ 348. In general this presumption can be redargued only by the payee's writ or oath on reference (*s*). But circumstances which indicate suspicion will have the same effect in limiting, or (if sufficiently strong) in overcoming this presumption, as they have on the presumption of onerosity in the acceptance (*t*) or indorsation (*u*). Accordingly, a bill drawn by the debtor in two bonds, payable to the creditor in them, and not bearing to be for value, was held to have been granted in satisfaction of the debt in the bonds, and not for present value (*x*).

§ 349. In bills or orders for delivery of goods, there seems to be a presumption of onerosity as between the granter and the party

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(*l*) Christisons *v.* Kerr, 1734, M., 12,599, Elch., "Deathbed," No. 5.

(*m*) Erak., 3, 2, 29—Thomson, 87—Tait, 476—Wilson *v.* Loder, 1848, 10 D., 560—Malcolm *v.* Ballendene, 1835, 13 S., 1021—Ker *v.* Brown, 1715, M., 1589—Scott *v.* Laing, 1707, M., 1535—Swinton *v.* Thom, 1709, M., 1536. The Earl of Forfar having drawn a bill on his regimental agent in these terms, "Pay to T. Agnew or order, out of the first subsistence you receive for me, which shall become due eight months after date," in an action of recourse by the executor-creditor of Agnew against the drawer's representatives nearly sixteen years afterwards, the Court presumed value as between the Earl and Agnew; M'Dowal *v.* Douglas, 1731, M., 1541. (*n*) Thomson *v.* Gall, 1805, Hume, 53. (*o*) Authorities in note (*m*). (*p*) See Wilson *v.* Loder, 1848, 10 D., 560. See *supra*, § 339. (*r*) Wilson *v.* Loder, *supra*.

(*s*) Authorities in note (*m*), *supra*. (*t*) See *supra*, § 340, *et seq.*

(*u*) See *infra*, § 354, *et seq.* (*x*) Cheap *v.* Arnot, 1712, M., 1537.

in whose favour they are granted. But it may be overcome parole evidence (*y*).

III. *Presumption of Onerosity as between the last and previous holders.*

§ 350. There is a strong presumption that the holder of a b obtained it from the indorser or previous holder for an onerous co sideration (*z*). This applies although the indorsee's right was n onerous at first, provided he ultimately came to hold the bill value (*a*).[8] And he is considered an onerous indorsee where he h only a joint right with another person (*b*). The same exceptio applies here as in the presumptions already noticed, that where t indorsation appears on the bill, or is admitted to be for "value account" between the indorsee and indorser, full value is not p sumed, but depends on the state of accounts between these p ties (*c*).

§ 351. In strictness, the presumption of onerosity in the ind sation applies only to bills and promissory notes. But indorsatio of custom-house debentures have been presumed onerous (*d*), though they seem not to have the privilege of bills in being f from latent objections against prior holders (*e*).

(*y*) Arbuthnot *v.* Pyper, 1714, M., 1505—Merchiston *v.* Robertson, 1672, M., 15 2 Sup., 629, S. C. (*z*) Ersk., 3, 2, 31—Thomson, 86—Tait, 477. This is old rule; see Auchinleck *v.* Miller, 1715, M., 1537. It applies although the bill not bear to be payable to order; Robertson *v.* Burdekin, 1843, 6 D., 17.

(*a*) Stewart *v.* Wyllie, 1849, 11 D., 1123—Glen *v.* National Bank, 1849, 12 D., 35 Kidston *v.* Stead, 21st Jan. 1809, F.C.; see also Moffat *v.* M'Kenzie, 1822, 2 S., 75

(*b*) Aitchison *v.* M'Donald, 1823, 2 S., 478. (*c*) *Supra*, § 339—Wightma Johnstone, 1700, 4 B. Sup., 477—Wilson *v.* Loder, 1848, 10 D., 560; per Lord Medw see this case *supra*, § 347 (*p*). See also Donaldson *v.* Macdonnell, 26th Jan. 1 F. C. The case of Harris and Co. *v.* Crosbie, 1775, as reported in 5 B. Sup., 39 against the rule in the text. But that report is erroneous; see the case in Hailes, and M., 2577. See also Burnet *v.* Ritchie, 1778, M., 1519. (*d*) L. Castlehi Watson, 1760, M., 1475. But writ or oath will probably not be held necessary to c come this presumption; see *supra*, § 349. (*e*) Alison *v.* Seton, 1750, M., 16,9 Elch., "Bill," No. 46, S. C.

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[8] An indorsee who received a bill in security of a previous debt by the indorse an onerous holder; and where a drawer indorsed a bill in order that the indorsee m get it negotiated, and, when the indorsee was unable to get the bill negotiated, told hi keep it for a previous debt, the indorsee, in an action against the acceptor, was held onerous holder. "A bill may be put into a party's hands for a particular purpose, there may be engrafted on his title of possession a different purpose;" Gordon *v.* P 1860, 22 D., 903.

§ 352. Except in cases of a really suspicious character, the presumption of the indorsation being onerous can be overcome only by the holder's writ or oath on reference (*f*). It will not give place to the strongest averments of non-onerosity, which are not borne out by the apparent or admitted facts (*g*). It has been sustained even where the facts raised some suspicion (*h*).

§ 353. This presumption has been applied where the indorsation was challenged under the Act 1696, c. 5, as having been granted in security of former advances and not for present value. In such cases the challenger has been obliged to prove his allegation by writ or oath (*i*). When the bill is challenged on the Act 1621, c. 18, as granted *inter conjunctos* without value, it will be good in the hands of an onerous indorsee (*k*). Where the indorsation itself is challenged under that Act, the same principles will apply as where the objection is taken against the acceptance (*l*).

§ 354. The question has often been raised, Whether an indorsation made after the term of payment of the bill is presumed to be onerous? [9]

It is now settled, on the one hand, that the circumstance of the indorsation having occurred at that stage, is not sufficient of itself to exclude the presumption (*m*). Thus where a bill dated 1st June, and payable 3d December, 1818, accepted by M'Kellar in favour of M'Callum, had been indorsed by M'Callum to M'Gowan in December 1823,—in an action by M'Gowan against M'Kellar shortly after

(*f*) Authorities in note (*z*), *supra*.

(*g*) Wight *v.* Ritchies, 24th June 1809, F. C.—Scott, 19th Dec. 1809, F. C.—Craig *v.* Shiels, 15th Dec. 1809, F.C.—Denniston *v.* Thomson, 1822, 1 S., 319—Cairncross *v.* Mitchell, 1824, 2 S., 774—Naysmith *v.* Lawrie, 1824, 3 S., 166—Dunlop *v.* Reid, 1827, 5 S., 796—Napier *v.* Sandiman, 1829, 8 S., 273—Bell *v.* M'Kune, 1831, 9 S., 587—Boag *v.* Fisher, 1849, 11 D., 362:—*Contra*, Corrie *v.* Aitken, 1765, M., 1520. In the case of Van Cherant *v.* M'Kay, 1735, Elch., "Bill," No. 7, which, as reported, seems to go against this rule, the Session Papers (vol. 8, p. 1024) show that the suspicious circumstances appeared from the holder's oath. (*h*) See cases in following notes.

(*i*) Mansfield, Hunter, & Co. *v.* M'Ilmun, and Iidem *v.* Douglas, 1770, both noted in M., "Bills," Appx. No. 2, and Hailes, 850—See also Stein *v.* Forbes, 1791, M., 1142—Richmond *v.* Pelican Insu. Co., 1805, M., "Bankrupt," Appx. No. 24—Dundas *v.* Smith, 1808, M., ib., No. 28, and Campbell *v.* M'Gibbon, 1780, M., 1139—compared with Campbell *v.* Graham, 1713, and Durward *v.* Wilson, 1700, M., 1119 and 1120—Arrol *v.* Marshall, 1821, 1 S., 67—Pattison *v.* Campbell, 1827, 5 S., 208. (*k*) *Supra*, § 345. (*l*) *Supra*, § 345. (*m*) 1 Bell's Com., 403—Wilkie *v.* Wilson, 30th November 1811, F. C.—Frier *v.* Richardson, 1806, M., "Bills," Appx. No. 19—Crawford *v.* Robertson, 30th June 1814, F. C.—Pattison *v.* Campbell, 1827, 5 S., 208—Per Lord (Ordinary) Corehouse in M'Donald *v.* Langton, 1836, 15 S., 304—and cases in following notes.

[9] *Infra*, note 10.

his indorsation, it was held that he was entitled to the pri
an onerous holder, there being no marks of dishonour upo
to raise the suspicion that it was not negotiable (*n*). Ag
question between the drawers and indorsees of a bill, w
latter admitted that they had not originally been parties t
after it was past due they had taken it up (without ind
from a bank where it had been discounted, that part of it
previously paid by the acceptor, and that the acceptor
brother of one of the indorsees, who were a mercantile co
it was held that these circumstances were not sufficient
that the indorsees were not onerous holders; and no othe
non-onerosity being offered, the Court refused to suspend
by the indorsees against the drawer (*o*). So where a bill
by Adam in favour of J. & T. Gilchrist, having been blank
to a bank, had been protested, and two months after pr
been transferred to Boyd, and where Boyd charged Adam
ment,—in a suspension by Adam on the ground that he
certain dealings with the Gilchrists, and that they had a
his other creditors agreed to accept of a composition, it
ther arranged that the amount of their claim should be sett
a reference, but that in order to defeat that arrangemen
christs had furnished money to Boyd to take up the bill,
Boyd was therefore not an onerous indorsee,—the Court
these allegations of Adam could only be proved by Boyd
oath (*p*). In another case Young had accepted bills for
and £16 respectively to M'Carter, the first of them being
June, and the two others in August 1823, and M'Cart
discounted them with a bank agent, they came into the
Pollock, who alleged that M'Carter had retired them, an
was M'Carter's onerous indorsee. Young having died in
1824, Pollock raised action against his heir in Febru
The defender, without denying that the bills had been
pleaded that they had been retired by Young, who (he all
£100 lying in the bank when the bills fell due, and that
after indorsing them to the bank, had never properly
them. The bills for £40 and £16 bore no mark of noting
for £30 was noted, but no protest had been extended upo

(*n*) M'Gowan *v.* M'Kellar, 1826, 4 S., 498. (*o*) Muir & Co.
1831, 9 S., 535. This case was not meant to touch the question whether
de jure might have been allowed in support of the suspender's allegations.
Lord Ordinary's interlocutor. (*p*) Adam *v.* Boyd, 1830, 8 S.,

on the back of this bill were jottings in the hand of the bank agent's clerk, which (*inter alia*) bore, "Two bills £40," and deducted that sum from "Receipt £100." Pollock denied that these jottings had any reference to a settlement with the bank, and pleaded that nothing appeared on the face of the £30 bill to make him doubt that it as well as the others were subsisting documents of debt. The Court sustained that plea, and held that the alleged fraud or non-onerosity could only be proved by Pollock's writ or oath (*r*).

§ 355. On the other hand, the fact that an indorsation was dated after the bill fell due goes far towards excluding the presumption in favour of onerosity; and it will not require strong corroborating circumstances to throw upon the indorsee the burden of proving that he holds under an onerous transaction (*s*). If the bill bears marks of dishonour, the presumption of onerosity will be held not to apply, because as the indorsee acquired the bill when it was *ex facie* not a negotiable instrument, there is not ground to presume that he gave value for it as negotiable (*t*). The "noting" by a notary-public on protesting the bill will usually be a sufficient mark for this purpose, although it will not always overcome the presumption of onerosity (*u*).

§ 356. The law of England differs considerably from ours in this class of cases. It is there held that an indorsee, whose right was acquired after the bill had fallen due, is subject to all the latent objections which attach to the document (*x*).[10]

(*r*) Young *v.* Pollock, 1831, 10 S., 8. (*s*) 1 Bell's Com., 403. See this illustrated by the following cases:—Ramsay *v.* Aitken 1825, 4 S., 390—Robertson *v.* Annan, 1825, 4 S., 40—Leishman *v.* Mercer, 1822, 1 S., 318—Thomson *v.* M'Lauchlane, 1823, 2 S., 497 (as noticed in Thomson on Bills, 98)—Farquhar *v.* Sloan, 1830, 9 S., 112—Macdonald *v.* Langton, 1836, 15 S., 303—Beveridge *v.* Henderson, 1841, 4 D., 87—With which cases compare Ferrie *v.* Mathie, 1824, 3 S., 174—M'Lauchlane *v.* Henderson, 1831, 9 S., 753. (*t*) 1 Bell's Com., 403—Wilkie *v.* Wilson, 30th Nov. 1811, F. C. (*u*) Compare the opinions of Lord (Ordinary) Corehouse in Macdonald *v.* Langton, 1836, 15 S., 303, and Lord Balgray in Smith *v.* Murdoch, 1829, 7 S., 671, with Young *v.* Pollock, 1831, 10 S., 8, *supra*, (*r*), where a party was presumed to be the onerous holder of a group of three bills between the same parties and of nearly the same dates, all of them having been indorsed after the dates of payment, and one of them bearing *ex facie* marks of noting. Professor Bell (Princ., § 332), citing Macdonald *v.* Langton, *supra*, lays down that if a bill has been noted as dishonoured the indorsee will be liable to all latent exceptions. But neither in that case nor in Smith *v.* Murdoch, to which the same learned author also refers, did the point arise purely. (*x*) Chitty on Bills (9th ed.), 218—Bayley on Bills, 159—Taylor *v.* Mather, 1789, 3 Durf. and E., 83, note—Brown *v.* Davis, 1789, ib., 80. See also 1 Bell's Com., 402.

[10] The law of Scotland on this point has been assimilated to the law of England by

§ 357. The following decisions show what circumstances Court consider sufficient to exclude the presumption of onero or (if not strong enough for that purpose) sufficient to warran vestigation into the facts by other proof besides the indorsee's or oath.

Where the acceptors of a bill, which they alleged was an ac modation bill, suspended a charge at the instance of the la three indorsees, and the charger in his oath on reference, adm that he was not an onerous holder, but stated that he held as tee for a previous indorsee, whose right he alleged on record onerous and *bona fide*, the Court suspended the diligence on tion, although it was contended that the oath had not overcom presumption of the onerosity either of the prior indorsations the acceptance (*y*). Again, where Kippen, as indorsee of a bi £139 drawn by James Macgill & Co. on Miller, charged Miller, alleged that the bill had been fraudulently filled in with that instead of £3, as he had intended; and where it appeared that was no such firm as James Macgill & Co., and that James Ma was an undischarged bankrupt, and Kippen the concurring cre in his sequestration; the Court suspended the diligence wit caution or consignation (*z*). Thus also in an action by the h against the acceptors of a bill blank indorsed, it was held suffi to overcome the presumption of onerosity that the holder adm having received the bill from his brother, who was the dra trustee, that he had given in a statement as to the value whic inconsistent with the terms of the bill, and that the action ha been raised until three years after the bill had fallen due, and his brother the trustee had become bankrupt (*a*). In another

(*y*) Thomson & Co. *v.* Sharp, 1849, 11 D., 887. (*z*) Miller *v.* Kippen, 11 D., 233. See also Carrick *v.* Mills, 1828, 6 S., 735. (*a*) Thom M'Lauchlane, 1823, 2 S., 497.

the 16th section of the Mercantile Amendment Act, which provides:—"When a of exchange or promissory note shall, after the passing of this Act, be indorsed aft period when such bill of exchange or promissory note became payable, the indo such bill or note shall be deemed to have taken the same subject to all objecti exceptions to which the said bill or note was subject in the hands of the indorse and 20 Vict., c. 60. According to the law of England, the latent objections to wh indorsee of an overdue bill is subject, are those intrinsic to the bill, but not obje arising from collateral circumstances, such as a right of set-off against the holder. It would appear that the original absence of consideration is not held one of the equities which attach to the instrument; Byles on Bills, 8th edition, Mercantile Law Commission of 1855 on the differences between the laws of Sc and England as to Bills and Notes.

the drawer and indorser of a bill had addressed a letter to one of the acceptors, promising to retire it when due; the indorsee was brother-in-law to the drawer, and the indorsation was dated after the drawer had executed a trust-deed for behoof of his creditors, and after a bank (of which the drawer was agent) had seized on all his property in consequence of his defalcations. In an action by the indorsee against the representatives of the other acceptor, where the pursuer alleged that the consideration had not been money advanced, but business in law agency, the Court, after remitting to an accountant to examine the books of the parties, assoilzied the defenders; and the House of Lords affirmed the judgment (*b*). Again, J. A. & Co., were drawers of a bill which they discounted with a bank. Having been dishonoured and protested, it was retired; and J. A.'s brother (whose name appeared as indorser, and in whose favour a receipt had been granted by the bank) charged the acceptor for payment. He suspended on the ground that it was an accommodation bill, and that the holder was not an onerous indorsee; and in support of his allegation he produced a letter from J. A. & Co., dated the day after the bill had been retired, stating that it was then in their hands; which letter it was maintained showed that the bill had been retired by J. A. & Co., and had afterwards been conveyed to the indorsee. The Court, satisfied from these circumstances that the indorsation was not onerous, suspended diligence on the bill, without requiring caution (*c*). Where the acceptor of a bill raised a suspension of a charge by an indorsee on the ground that the bill had been granted in order to induce the drawer to drop a prosecution against the acceptor for theft, that it had been produced at the trial, and that the indorsation was not onerous; and where it appeared that the indorsation had been posterior to the trial, but that a part of the bill, which had borne the date of indorsation, had been torn off; the Court granted the suspension, which the acceptor had only asked to be passed on caution (*d*).[11]

(*b*) Hunter *v.* George's Tr., 1832, 10 S., 561; affd., 7 W. S., 333. The opinion of Lord Wynford (who proposed the judgment in the House of Lords) tends towards relaxing the presumption in favour of onerosity. But Lord Moncreiff observed, in Miller *v.* Kippen (11 D., 235), that he would not be inclined to rest much on the opinion of that learned Lord; as the rules on this branch of Scotch law seem to have been new to him, and to have amazed him. (*c*) Ramsay *v.* Aitken, 1826, 4 S., 390. With this case compare Muir *v.* M'Donald, 1831, 9 S., 535. (*d*) Kennedy *v.* Cameron, 1828, 2 S., 192.

[11] In an action by N. B., as holder of a bill drawn by A. B. & Co., against the ac-

§ 358. On the other hand, the presumption of onerosity been applied in favour of the last holder of a bill blank indor although he had received it from a stranger on discount, afte had been stolen from the proper owner (*e*).[12] Nor will the presu tion be overcome merely by *mora* to raise action on the bill; years having been fixed by statute as its limit. Accordingly presumption has been held to apply where an indorsee had held bill for nearly five years without claiming upon it, his accour how he had acquired it, and of the *mora*, being satisfactory Before the introduction of the sexennial prescription, howeve was held that the lapse of three years and upwards without dem on the bill deprived the indorsee of his presumption of onerosity Where the indorsees of a bill for £27 charged the acceptor drawer, who suspended on the ground (*inter alia*) that they

(*e*) Scott *v.* Kilmarnock Bank, 27th February 1812, F. C.—Lambton *v.* Mar 21st June 1799, F. C. See also Crawford *v.* Royal Bank, 1749, M., 875, and Sw *v.* Beveridge, 1799, M., 10,105, where the same principle was applied as to stolen notes. In none of these cases was the holder privy to the theft. In Swinton *v.* ridge the public prosecutor had purchased the notes knowing them to have been s and his right to them was sustained against that of the party from whom they had stolen, as he had given value for them to the previous holder. (*f*) Fe Mathie, 1824, 3 S., 174—M'Gown *v.* M'Kellar, 1826, 4 S., 498. See also M'Lauc *v.* Henderson, 1831, 9 S., 753—and Young *v.* Pollock, 1831, 10 S., 8, *supra*, § 354

(*g*) See cases in Brown's Synop., 244, 5.

ceptor, it appeared that the bill had been granted for accommodation of A. B. of which firm A. B., brother of N. B., was sole partner, that the estates of A. B. had been sequestrated, but no claim was made in the sequestration by N. B. there were no entries in N. B.'s books relative to the bill, that N. B. had had acc the repositories of A. B., and that there had been a delay of three years in bringir action. Proceeding on these and other circumstances, the Lord Ordinary (And held that N. B. was not entitled to the privileges of a *bona fide* onerous holder. Court altered that interlocutor, and appointed the charger to state where he got th and what he gave for it; and they afterwards, under commission, recovered doc tary evidence. They came to the conclusion that the pursuer, a conjunct and dent person, had failed to show that he acquired the bill for value, and that i proved to have been an accommodation bill, and therefore they found him not er to the privilege of a *bona fide* onerous holder, and assoilzied the defender. The Justice-Clerk (Hope) said, that to find the pursuer not a *bona fide* holder, would been enough to support the judgment, whether he was an onerous holder or not; natyne *v.* Wilson, 1855, 18 D., 230—Middleton *v.* Rutherglen, 1861, 23 D., 526.

[12] This is not now law; by the 15th section of the act 19 and 20 Vict., c. 60 (M tile Amendment Act), it is provided, that "Where any bill or note has been lost, s or fraudulently obtained, the holder of such bill or note, sueing or doing dili thereon, shall be bound to prove that value was given by him for the same; but proof may be made by parole evidence."

granted to the indorsees a new bill for £47, in order that it might be discounted, and its proceeds applied in extinction of the bill charged on; the indorsees alleging, on the other hand, that they only held the £47 bill in security of the other; the Court held that the suspender's allegation could only be proved by the charger's writ or oath (*h*).

§ 359. The presumption in favour of an indorsee proceeds on the footing that he acquired the bill with the legal consent of the previous holder; and its application, therefore, is limited to cases which impugn the *onerosity* of the transaction from which his right arose. Where, however, the objection is that the indorsee acquired the bill by fraud, and that therefore he is not entitled to retain or use it for any purpose whatever, the presumption in question has no place; and the averment may be proved *prout de jure*, although there should be nothing in the patent or admitted facts to call the holder's right in question (*i*). This rule, for example, must apply where it is alleged that the indorsation is forged, or that the party holding a bill blank indorsed stole it from the previous holder. Indeed, if the proof of such averments were limited to the holder's writ or oath, the consequence would be that frauds of this kind would escape detection; since the holder would take care not to leave written evidence of his act; and he would be entitled to decline examination on oath upon the facts, as that would involve him in the risk of a criminal prosecution.[13]

§ 360. In order to bring the case within the principle thus stated, it is not enough for the party who challenges an indorsation to aver either that the indorsee conspired with the indorser for the

(*h*) Haig *v.* Service, 1832, 11 S., 145. (*i*) The distinction stated in the text is supported by the cases cited *supra*, § 344. See also Wilson *v.* Mitchell, 1827, 5 S., 318, where a party charged as payee and indorser of a promissory note alleged that the indorsation was a forgery, and the Court being satisfied by a comparison of the indorsation with specimens of the party's genuine handwriting, suspended the diligence. Again, in an action by Fyfe against Edward for delivery of a bill which the defender some time previously had granted to the pursuer, where the latter proved that the bill had been abstracted from the hands of a messenger with whom he had deposited it, the Court ordered the bill to be restored; Edward *v.* Fyfe, 1828, 2 S., 431. So in Cairns *v.* Marianski, 1850, 12 D., 920 (affd. on bill of exceptions, 1 Macq., 212), where the heir of an old man got decree of reduction of (*inter alia*) certain indorsations to bills in favour of the old man's son-in-law, on the ground that they had been impetrated from him by fraud and circumvention when he was weak and facile; the proof was unlimited. See also Smith *v.* Stark, 1831, 10 S., 150—Wallace *v.* Scott, 1848, 10 D., 1277—Leishman *v.* Mercer, 1822, 1 S., 353.

[13] See 19 and 20 Vict., c. 60, § 15; *supra*, § 358, note 11.

purpose of defeating latent objections to the bill, or that the i
fraudulently used the indorsation for a different purpose fro
which the indorser intended. The ordinary cases against th
osity of an indorsation imply one or other of these frauds
only where the objector directly impugns the indorsee's r
hold or use the bill, and condescends specifically on a fra
acquisition of it, that the principle referred to applies, and t
proof of the fraud is unlimited (*k*).

§ 361. In several cases where there was an appearance
lusion between the indorsee and the drawer, the Court allov
indorsee to be judicially examined (*l*). But they have alw
fused this mode of investigation when the allegations agains
osity were not supported by circumstances of a suspicious
ter (*m*).

§ 362. The Court also allow an investigation into the b
the indorsee and indorser where there is some ground for sus
non-onerosity (*n*); and they will probably not refuse to s
diligence on the bill upon caution, where the allegation
onerosity, although not supported by the admitted facts, is
to be proved from the indorsee's books (*o*).

§ 363. Where a notary public had been employed b
agents to protest their bills, under an arrangement by wh
only drew one-fourth of his business charges, and they recei
remainder, in an action of damages at their instance agai
on account of a blunder which he had committed, the Court
that he might prove *prout de jure* his averment that they w
onerous holders of the bill, and consequently would not h
ceived the amount of the bill if it had been formally protest
The Court considered that, apart from any question as to th
nature of the agreement, the rule that non-onerosity could
proved by the indorsee's writ or oath, did not apply to such

(*k*) On the subject of this paragraph see Burns *v.* Burns, 1841, 3 D., 1273,
Fullerton—Little *v.* Smith, 1845, 9 D., 764, per L. Moncreiff—Crawford *v.* B
30th June 1814, F. C.—M'Gown *v.* M'Kellar, 1826, 4 S., 498—Young *v.* Pollo
10 S., 8—See *contra*, per Lord Justice-Clerk in Little *v.* Smith, 8 D., 269—S
and 353, as to frauds against the indorser's creditors. (*l*) Campbell *v*
1822, 1 S., 292—Cairncross *v.* Mitchell, 1824, 2 S., 774—Fell *v.* Lyon, 1830,
—Smith *v.* Stark, 1831, 10 S., 150. See also Little *v.* Smith, 1845, 8 D., 265—
v. Ballendene, 1835, 13 S., 1021. (*m*) Dunlop *v.* Reid, 1827, 5
Campbell *v.* Hill, 1826, ib., 54. (*n*) Finlayson *v.* Murray, 1822, 1
Pentland *v.* Bell, 1822, 1 S., 464—Farquhar *v.* Sloan, 1830, 9 S., 112—Ca
Dryden, 1824, 3 S., 320. (*o*) Cases in preceding note, compared wi
v. Ayton, 1822, 1 S., 338. (*p*) Murray *v.* Taylor, 1829, 6 S., 802.

IV. *Presumption of Onerosity of Foreign Bills and Indorsations.*

§ 364. When action is raised in Scotland on a bill which was granted or indorsed in a foreign country, the question sometimes arises, whether the defender's averment of non-onerosity must be proved by writ or oath, or whether it may be instructed *prout de jure*, if such proof is competent by the *lex loci contractus*. The leading authority in this branch of international law is the case of Don *v.* Lippmann, decided by Lord Brougham in the House of Lords (*r*). In that case the action was against the representatives of the acceptor of a bill drawn and accepted in France, and admitted to be payable there, the acceptor being a Scotch landed proprietor, who had returned to Scotland before the bill fell due. The defenders pleaded that, as the action had not been raised till nineteen years after the date of payment, the case came under the sexennial prescription; whereas the pursuers contended that it must be determined by the prescription existing in France, the *locus contractus*. The Court of Session having sustained the latter plea, the House of Lords reversed the judgment, and found that the sexennial prescription applied, and that therefore the pursuer could not succeed unless he proved by the defender's writ or oath both the original constitution and the subsistence of the debt in the bill. The ground of reversal was, that while the *lex loci contractus* fixes the nature and effect of the obligation undertaken by the parties, the *lex fori* must regulate the mode by which the contract may be enforced, and by which any defences to its validity or subsistence may be investigated and proved.

§ 365. This decision expressly regulates those cases only where the mode of proof is limited by statute in consequence of the creditor having delayed to raise his action. But the principle of the decision applies equally to cases where the creditor's proof is limited on account of the nature of his allegations. Accordingly, where a promissory note, dated in Edinburgh, granted by a Scotsman residing there, and payable to a London company, but without a specified place of payment, had in England been indorsed by the payee to an English company, and by them to an English bank, in a suspension raised by the granter of a charge, at the instance of the bank, it was held that the bill was a Scotch document, capable of

(*r*) 1837, 2 S. and M'L., 682, reversing 14 S., 241.

being endorsed although it did not bear to be payable "to ord and that the granter's averments against the onerosity of the ind sation could only be proved by writ or oath according to Sco law, and not *prout de jure* as in England (*s*). It was here admit both by the bench and the bar, that if the note had been foun be an English document, the indorsation would have been inef tual; as the note did not bear to be payable "to order," which England is essential to make such a writing indorsable.

Again, where a bill drawn by an English firm upon their ag in Scotland, and payable in England, had been indorsed by drawers to their bankers in the latter country, in a suspensio the instance of the acceptor, it was held that the bill was a Sco document, and that the allegation that the indorsation was onerous could only be proved by writ or oath, according to the p tice in this country (*t*).

§ 366. In both of these cases it will be observed that the was a Scotch document; and therefore they do not expressly se whether, in an action in Scotland on a foreign bill, the defence t the acceptance or indorsation is not onerous, can be proved only the creditor's writ or oath. But there can be little or no doubt t according to the principle of these cases, and of the case of Do Lippmann (above referred to), the Court of the debtor's domi ought to apply their own rules of evidence for determining question of onerosity, whether the document was of Scotch o foreign origin (*u*).

Some farther illustrations on this subject will be found in chapter upon international questions in the law of prescription.

(*s*) Robertson *v.* Burdekin and Co., 1843, 6 D., 17. (*t*) Strathern *v.* Ma man and Co., 1850, 12 D., 1087. (*u*) The view stated in the text is op to the case of Glyn *v.* Johnstone, 1830, 8 S., 889, where a bill accepted in Scotlan Scotsmen, payable in London, having been indorsed to a London company, and by been discounted with and indorsed to a bank,—in an action in the Court of Sessio the bank against the acceptors, it was held that the bill was an English debt, that defender's allegations of non-onerosity in the indorsation could be proved *prout de* according to the practice in England, and that the Scotch rule, which required pro the indorsee's writ or oath, did not apply. That decision, however, it is conce must now be regarded as overturned by the case of Don *v.* Lippmann. Its auth as a precedent has been challenged in that case, as well as in the cases of Roberts Burdekin, and Strathern *v.* Masterman and Co., noticed in the preceding paragrap

[14] All bills drawn within the United Kingdom payable to, or drawn on, any within the United Kingdom, are now inland bills; 19 and 20 Vict., c. 60, § 12.

CHAPTER VI.—OF THE PRESUMPTION AGAINST DONATION.

I. *Of the Presumption generally.**

§ 367. As mankind do not frequently prejudice themselves to benefit others, a deed or transaction is held not to be a donation if the circumstances are fairly consistent with a different inference, *e.g.*, loan, deposit, or sale (*a*). This is a weak presumption, and may be overcome not only by direct evidence *prout de jure*, but by contrary inferences drawn from the relative position of the parties, the nature of the right claimed, and the circumstances attending the transaction. The older authorities press this presumption too far; some of them holding that nothing should be held a donation if the facts could bear any other construction. The proper principle is merely that the burden of proving donation lies on the party who avers it; and that the mere fact that a sum of money has been placed by one person in the hands of another is not of itself sufficient to prove that it was deposited *animo donandi* (*b*). Where bills were challenged as having been obtained from a party without value and on false representations, and where the holders alleged that they received them from him as donations, the Court required the challenger to stand pursuer of the issue, although he pleaded that the presumption against donations threw the *onus probandi* on the holders of the bills (*b**).[1]

* This presumption is not properly stated in the brocard *donatio non presumitur;* for the principle is not merely that there is no presumption in favour of donation, but that there is a slight presumption against it. (*a*) Stair, 1, 8, 2, and 4, 45, 17 (14) —Ersk., 3, 3, 92. (*b*) British Linen Co. *v.* Martin, 1849, 11 D., 1004—Heron *v.* M'Geogh, 1851, 14 D., 30, per Lord Fullerton. (*b**) Wilkie *v.* Chalmers, 1854, 16 D., 961.

[1] Perhaps the presumption is not so weak as is implied in the text. The general statement, that it may be overcome by evidence *prout de jure*, is believed to be good law; but there have been important dicta lately to the opposite effect. When one is in possession of money received by him from another, it will be held that he got it under an obligation to repay; and if he maintains that he got it on any other footing, he must prove it. Between loan and donation there is, as the general rule, no hesitation; the law presumes loan, not donation. When the receipt of money is proved by a simple acknowledgment, loan is presumed; but it is thought competent to prove by parole that the money was received as a gift; Fraser *v.* Bruce, 1857, 20 D., 115. Where receipt of money was acknowledged in these terms, "Received £30, as per agreement," it was held competent to prove by parole that the money was given and received as a donation; and the majority of the Court thought that the words, "as per agreement,"

§ 368. Payments by a parent or one *in loco parentis* wi
doubtful cases be regarded as made *ex pietate*, and not as loa

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affected neither the onus nor the competency of discharging the onus by
They held that the evidence had not overcome the legal presumption for loa
the Lord Justice-Clerk (Inglis) held that the document presented an apparen
biguity, which the party using it was bound to remove, and that, as he had no
so, he should not recover; Thomson *v.* Geikie, 1861, 23 D., 693. It is not
reconcile this case with the opinions of some of the judges in another recent c
which receipt of money was acknowledged in these terms, "I acknowledge the
of £100, and agree to pay interest on the same, if demanded." Lord Benholme
nary) held, in an action on this document, that the defence that the money was
must be established by the defender, but that he might prove it *prout de jure*. T
cond Division recalled his Interlocutor, and found that the defence could not be
by parole evidence. Perhaps the ground of judgment was that the receipt was
mission of a loan, and that donation could not be proved by parole in oppositio
terms; but the opinions of the Lord Justice-Clerk and Lord Cowan went far
that. The Lord Justice-Clerk laid down, without any qualification, as the doct
the law of Scotland, that "a donation cannot be proved by parole"; and Lord
as expressly, said "donation of money can only be proved *scripto vel juramento*."

Questions as to the nature and force of this presumption, and the evidence by
it may be overcome, have occurred in reference to the effect of possession of
dorsed deposit-receipt. It seems quite clear that the possession of an indorsed d
receipt, or of money drawn by means of an indorsed deposit-receipt, does not
the presumption against donation, or relieve the party from the necessity of provi
defence of donation. But as to the manner in which the presumption may be ove
the recent cases seem to leave room for distinction, and perhaps for hesitation.
an indorsee of a deposit-receipt uplifted the money after the death of the indors
alleged, in defence to an action by the executor of the indorser, that the indo
had been made by the indorser with the intention of making a gift to the sister
indorsee, the Court held that the defender's offer to prove this defence by his ow
mony (not his oath on reference), was incompetent. If his evidence was incom
so, necessarily, would all other parole evidence have been, however sufficient, if
tent. The question, whether the indorsation was not a mere mandate recalled
death of the mandant, in which case the defender would have had no title to upl
money, was discussed in this case, but was not made the ground of judgment,
was the incompetency of parole evidence to establish donation; Barstow *v.* Inglis
20 D., 230. On the other hand, where, in an action by an executrix for £1000,
had belonged to the deceased, the defence was that the deceased had presen
money to the defender by indorsing a deposit-receipt, and that the defender had
the money *before* the death of the indorser, the Court allowed the defender to t
issue of donation; Mackellar *v.* Hunter, 1858, 20 D., 761. And in another case
action by the representatives of a deceased against her agent, calling on him
count for a bill, it was held that his defence, that the deceased handed him t
and directed him to make a gift of it to a third party, and that he had done so
his client's death, might be proved *prout de jure*, as it resolved into a defence of ma
and Lord Cowan, delivering the judgment of the Court, took the distinction b
the case of an attempt to enforce donation not completed in the lifetime of the
and of an attempt to set aside a donation completed during his life. In the form
parole evidence, his Lordship held, would be incompetent; because promise or obl

advances. This was held where a father had purchased up a captaincy for his son when a lieutenant, and regularly entered the payment in an account in his son's name in his books (*c*); where a father had made payments to his son and heir, which were not more than sufficient for his maintenance and education (*d*); and where a wealthy uncle had paid sums for the education and outfit of a nephew and niece in poor circumstances, entering them in his books, but not taking any document of debt for them (*e*). Even where an elder brother in good circumstances had assisted in maintaining his younger brother during his apprenticeship, entering the payments in his books, but without taking any document of debt from the younger brother, or intimating to him that the payments were meant merely as loans, the Court held that they had been donations; the claim for repayment having been made by the elder brother's creditors in his sequestration (*f*). Again, on the ground of presumed intention, properties which a father had purchased in order to give votes to his sons were held as donations to them, although his settlement declared that any sums due by them at his death should be imputed to their provisions (*g*). And where one spent £67,000 in paying his son-in-law's debts, no entry of it appearing in his books, and no voucher for it being found in his repositories, it was held to have been ultimately a donation, although

(*c*) MacDougall's Cr. *v.* MacDougall, 1804, M., "Bankrupt," Appx. No. 21.

(*d*) Hislop *v.* Hislop, 18th Jan. 1811, F. C. (*e*) Campbell *v.* M'Alister, 1827, 5 S., 219—Wilson *v.* Paterson, 1826, 4 S., 817. (*f*) Drummond *v.* Swayne, 1834, 12 S., 342. (*g*) Whyte *v.* Whyte, 1841, 3 D., 468.

to make a donation cannot be proved by parole; his Lordship indicated an opinion that, in the latter case, parole proof might be competent; Mackenzie *v.* Brodie, 1859, 21 D., 1048. In a still more recent case, in an action against the housekeeper of a deceased for the contents of four deposit-receipts, the defence was that they had been indorsed in gift; and the money in three of them had been uplifted before the death of the indorser, and in the other after her death. Proof in the case was taken in the Sheriff-court; and in the First Division it was dealt with as a case in which the onus was upon the defender, and in which the evidence did not satisfy the onus. No distinction was taken in the opinions between the three receipts drawn before death and the one drawn after it, and the opinions seem to assume the competency of parole proof in both cases; Allan *v.* Beveridge or Munnoch, 1861, 23 D., 417, 33 Jur., 209. In an action by executors against a family doctor for debts due to the deceased, the defender produced the receipts which he had granted, and which he said had been handed to him by the deceased in order gratuitously to discharge the debt; the Court adjusted an issue to try whether the defender had obtained possession of the receipts, without the debt having been paid or otherwise extinguished, and intimated that the defender might, without a counter issue, establish his defence of donation; Knox *v.* Crawford, 1862, 24 D., 1088.

at first it seemed to have been meant as a loan. This is a s case, as the father-in-law had received interest during his l the amount (*h*).

§ 369. A different view was taken in regard to payments in 1811 and the three following years by a practising wri Dumfries to his brother when a divinity student in Edinbur help to maintain him at college, and to relieve a temporary n sity; the latter having in 1815, and again in 1832, written t brother (it seemed spontaneously) with a note of the sums a some counter-payments. Although the brother who mad advances had not entered them in his books, and had died in without it appearing that he had ever demanded re-paymen Court sustained a claim therefor brought several years after by his representatives (*i*). Again, where a party who poss slender means, and had several relations to whom he had beque sums by his settlement, blank indorsed a deposit-receipt for and placed it in the hands of one of his nephews, whom h named an executor and residuary legatee; and where the ne uplifted the contents of the receipt, and the uncle died six afterwards without having required the nephew to pay hir amount, which, if a gift to the nephew, would have material croached on the bequests to the deceased's relations, and i view might have absorbed the whole,—the Court held that was not sufficient proof of the nephew's averments that the re had been meant as a donation to him (*k*). A similar decisio pronounced in a case where a party, who was bed-rid from para had, shortly after executing a trust-deed of settlement under the trustees were residuary legatees, handed to one of the tru deposit-receipts for sums which nearly exhausted the whole due. The Court held that donation was not to be inferred fro mere possession of the documents; and that it lay with the alleging donation to prove it; which in the circumstances h failed to do (*l*). In the two cases last mentioned it was an im ant circumstance against the inference of donation, that the who received the documents of debt had been appointed b alleged donor to administer his funds. In another case, wh

(*h*) Farquhar's Tr. *v.* Stewart, 1842, 3 D., 658. (*i*) Murray *v.* M 1843, 6 D., 176. (*k*) Henderson *v.* M'Culloch, 1839, 1 D., 927. See shank *v.* Cruikshank, 1853, 16 D., 168, where a deposit-receipt taken by one in h and his son's name for a sum equal to nearly his whole means was held not t donation *mortis causa* to the latter. (*l*) Heron *v.* M'Geoch, 1851, 14 See also Harper *v.* Hume, 1850, 22 Sc. Jur., 577.

person the day before his death directed his clerk to draw £800 from his bank account, and to deposit it again in bank under a receipt in name of his house-keeper, the Court held that it had been meant as a donation; the confidence and kindly regard which the deceased had shown to the house-keeper, and his liberal provision for her in his trust-deed, making that the most probable inference in the circumstances (*m*).[2]

§ 370. When the question is whether sums given or payments made on behalf of a certain person are to be imputed as part of a provision secured to him by the settlement of the party who made the payment, the presumption against donation does not apply; and each case must be decided on the terms of the relative deeds and its own circumstances (*n*).

§ 371. In claims of remuneration for maintaining a person at bed and board, the presumption against donation comes into conflict with the rights of hospitality and benevolence; and it is sometimes difficult to determine whether the alimony was gratuitous or the reverse. If the person entertained was major and capable of contracting obligations, it will be held *in dubio* that the entertainment was given to him from motives of hospitality, or in consideration for past or expected services; because the host might have stipulated for remuneration if he had meant the entertainment not to be gratuitous (*o*). This also holds when the entertainment is to a minor whose father is alive (*p*), or who has tutors or curators; because the intention to exact board should have been embodied in a mutual contract with the minor or those acting for him (*r*). If, however, the host earns his livelihood by entertaining strangers, ali-

(*m*) British Linen Co. *v.* Martin, 1849, 11 D., 1004. (*n*) Compare Fyfe *v.* Kedslie, 1847, 9 D., 853—Buchanan *v.* Crawford, 1822, 1 S., 385; affirmed 2 Sh. Ap., 445—Whyte *v.* Whyte, 1841, 3 D., 468. See also Scott *v.* Scott, 1846, 8 D., 791—and *supra*, § 222, *et seq.* (*o*) Stair, 1, 8, 2—Ersk., 3, 3, 92. (*p*) Ersk., *supra*—Cases in M., 11,425, 6. But see Steven *v.* Simpson, 1791, M., 11,458, where a lad, having quarrelled with his stepmother, had been taken into the house of his uncle, and there maintained for a year and a-half with his father's knowledge; and the Court, on the father's death, sustained the uncle's claim for payment of the aliment.

(*r*) Ersk., 3, 3, 92.

[2] Allan *v.* Beveridge or Munnoch, 1861, 23 D., 417, 33 Scot. Jur., 209, *supra*, § 367, note [1]. Where a widow laid out money in improving the heritage of her son, the heir (then a pupil), which heritage she liferented, it was held in an accounting between the heir and his mother's representatives, that the sums expended were not to be looked on as donations, but that the representatives were entitled to take credit for them so far as the heir took benefit; Paterson *v.* Greig, 1862, 24 D., 1370. This case was taken to appeal, but compromised.

mony, whether given to a major or to a minor, will not be regard as gratuitous (*s*). When the person alimented is a lunatic, or a pu or minor without tutors or curators, and the host is not a near lative, the entertainment will, *in dubio*, be held not to be gratuito because there was no one with whom the party could have mad contract for repayment (*t*). And the same principle will be appli to alimony afforded to a pupil whose father or tutors are out of t country (*u*). But if the host is either the mother or *in loco paren* of such pupil or insane person, the aliment will be considered furnished from natural affection, or from a sense of natural oblig tion, and therefore there will not be a good claim for repayme although the person maintained had not a father or tutors wi whom an onerous contract could have been made (*x*). Yet a cla for recompense will be sustained if the person alimented had su independent means as made benevolence unnecessary (*y*). It is presumed that even the father of one who has an independency tended to maintain and educate him without remuneration (*z*). the circumstance that a pupil or lunatic succeeded to an indepe dency while he was being thus supported will only give a claim the expense incurred subsequently, not for bygone alimony, whi at the time was meant to be gratuitous (*a*). Where a lady who h a considerable fortune had resided with her brother-in-law fr childhood to forty years of age, on her subsequent marriage a cla at his instance for aliment during the whole period was sustai against her and her husband; because there certainly was a g claim for the alimony furnished during her minority, and it to be regarded as continued afterwards *per tacitam reconven nem* (*b*).

§ 372. The presumption against donation does not apply deeds *inter virum et uxorem*, which the granter claims right to voke as gifts. The party founding on a deed of that nature m

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(*s*) Stair, 1, 8, 2 ("In all cases, &c.")—Ersk., *supra*—Forrest *v.* Carstairs, 1715, 9713, 11,098. (*t*) Stair, *supra*—Ersk., *supra*. (*u*) Ersk., *supr* See Chisholm *v.* Steedman, 1707, M., 11,428, one of the reports of which states that claim was sustained; the other that it was unsuccessful. (*x*) Stair, *supr* Ersk., *supra*—Ker *v.* Ruthven, 1637, M., 11,436—Hamilton *v.* Symington, 1667, 382—Guthrie *v.* Mackerston, 1672, M., 10,137—Row *v.* Row, 1676, M., 11,436. also Gourlay *v.* Urquhart, 1697, M., 11,438. (*y*) Ersk., *supra*—L. Lugto Hepburn, 1672, M., 11,435—Row *v.* Row, *supra*. (*z*) Ersk., *supra*—See *in* § 375. (*a*) Ersk., 3, 3, 92—Home *v.* Wedderburn, 1757, M., 412—But see L Lugton *v.* Hepburn, 1672, M., 11,435, and Gourlay *v.* Urquhart, 1697, M., 11,438.

(*b*) Spence *v.* Fowlis, 1681, M., 11,437.

lead evidence of its alleged onerous cause; the narrative of onerosity not being probative (*c*).[3]

II. *Of the Presumption against Donation by a Debtor to his Creditor.**

§ 373. The presumption against donation is generally strongest in regard to a deed or payment by a debtor to his creditor; because one is not likely to make a present and continue under an obligation when the same act might set him free (*d*). This presumption has place whether the alleged donation was made *de presenti* or *mortis causa*, and whether the parties are, or are not, relations. But each case depends on its individual circumstances; and the Court will take into view every fact which throws light upon the debtor's intention,—as, for example, the relationship or intimacy of the parties, the nature of the obligation, and of the supposed gift, and the occasion and way in which the latter was made (*e*). The application of this principle is illustrated by the following cases.

§ 374. Where one who had in his hands funds belonging to his son, major and forisfamiliated, made payments to him and on his behalf, these were held not to be donations, although the father had not entered them in his books, or kept vouchers for them (*f*). Again, a marriage was dissolved by the wife's death in 1809; whereupon £400 fell to her son as his share of the joint estate of his parents. In 1819 he received "in free gift" from his father (with

(*c*) Jardine *v.* Currie, 1830, 8 S., 937—Gray *v.* Scott, 1703, M., 12,602.

* This presumption is usually stated by the brocard *debitor non presumitur donare.* But that does not adequately express a presumption against such donations.

(*d*) Stair, 1, 8, 2—Ersk., 3, 3, 93. (*e*) Per Lord Justice-Clerk Hope in Scott *v.* Scott, 1846, 8 D., 791. (*f*) Fraser *v.* M'Gown, 1839, 2 D., 144—Black *v.* Booth, 1835, 14 S., 113.

[3] When a husband makes a gift to his wife of such a kind that she cannot have the benefit of it till after his death, it will be a question of circumstances whether that will be regarded as an onerous provision or as a revocable donation; and, if the wife is not otherwise provided for, the presumption will probably be that it is an onerous provision. Thus where a husband insured his life in name of his wife, was sequestrated, and died while undischarged; the Court of Session held that the policy was a donation revoked by the sequestration, and that, therefore, the sum in it was part of the sequestrated estate; but the House of Lords altered and preferred the widow, holding that, as she was not otherwise provided for, the policy was an onerous provision, not revocable, and not cut down by the sequestration; Craig *v.* Galloway, 1860, 22 D., 1211; rev. 1861, 4 Macqueen, 267.

whom he had been for some time in partnership as a jewelle goods worth £1300, and he discharged his father of that sum part of any provision the father might make to him. In 1831 was sequestrated; and in the sworn inventory of his assets he to no notice of the £400. In 1838, after being discharged unde composition contract, he claimed that sum from his father. T Court, without hearing the father's counsel, rejected the claim (g

§ 375. Where the father's outlay is in the way of educat and maintenance, the question is sometimes difficult. If the fat had actually money in his hands belonging to the child, such o lays may be allowed to compensate the interest (h). But a differ view will probably be taken where the father's debt is contained a formal obligation. Thus where a father had borrowed money bond from certain trustees for his children, and had, many ye afterwards, been sequestrated, a claim by his children for arrears interest was held not to have been extinguished by the aliment f nished by him to them, there being no appearance of an intent on his part to keep up a counter-claim therefor (i). The Court a refused to impute towards a provision by marriage-contract su which a father had expended in clothes and money payments his daughter, who had been left a widow with a family unprovi for, had lived in his house during a considerable part of the ti over which the advances extended, and to whom he had give regular yearly allowance from the commencement of her wid hood (k).

§ 376. Where there is no natural obligation to maintain, a diff ent view will probably be taken. Thus expenditure by a person maintaining and clothing his sisters while they lived in his fam was imputed towards their claim against him for the interest their provisions (l). And where the grantee of a bond for £6 claimed on the death of the granter the arrears of interest from date, his claim was rejected on the ground that it had been m than paid by an annuity of £120, which the granter had allow him (m).

§ 377. Where one has become bound to make a certain p

(g) Howden v. Howden, 1841, 3 D., 388. (h) Winrahame v. Elles, 16 M., 11,433—Maxwell v. Brown, 1669, M., 11,435. (i) Galt v. Boyd, 183 S., 332. See also Cunninghame's Exrs. v. Hume, 1731, M., 11,438. (k) S v. Scott, 1846, 8 D., 791. The sums were entered in the father's books.

(l) Gordon v. Maitland, 1757, M., 11,453, 11,161. (m) Hunter v. Du 1831, 9 S., 703 (affd. on another point, 6 W. S., 206). Compare with this case M crieff v. Burnett, 1775, M., 11,455.

vision to his child or grandchild, any legacies he may leave to him will be held as additional and not substitutional, unless an opposite intention appears from the circumstances; because it is likely that such an act proceeded from a natural desire to add to the child's succession (*n*). This has been held where the father's funds would not cover all his legacies and the provisions (*o*). On the same principle a legacy by a father was held to be additional to one left to the child by his grandfather and lying in the father's hands (*p*). The same rule seems also to apply to provisions by an uncle in favour of his nephew and heir-at-law, to whom he had previously granted a gratuitous bond (*r*). It also holds where the antecedent obligation by the father was an onerous obligation *inter vivos*, and not by way of provision (*s*). But provisions by a husband in favour of a wife will generally be held to be in satisfaction of his obligations by marriage-contract, even where the provisions are dissimilar in character (*t*). Whatever provision a father settles on his daughter on her marriage is presumed to be in extinction of all her rights under her father's marriage-contract, or under previous bonds of provision (*u*). And where a father was bound by his marriage-contract to leave 100 merks to the children of the marriage, a bond of provision for that sum to his only child was held to have met the obligation (*x*).

§ 378. The presumption against donation by a debtor may be overcome by the narrative of the deed in issue. This was held where the deed bore to be for services rendered to the granter and

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(*n*) Wedderburn *v.* Dundas, 1827, 5 S., 790—Ord *v.* Innes, 1685, M., 11,492—Clark *v.* Hay's Tr., 1823, 2 S., 313. See also Hunter *v.* Nicolson, 1836, 15 S., 159—Stair, 4, 45, 17 (15)—and see *supra*, § 370. (*o*) Clark *v.* Hay's Tr., 1823, 2 S., 277 (new ed.); see *supra*, § 221. (*p*) Winrahame *v.* Elles, 1668, M., 11,489. See also Ord *v.* Innes, *supra*—Balfour *v.* Balfour's Tr., 1842, 4 D., 1044.

(*r*) See Dickson *v.* Dickson, 1671, M., 11,490—Cruikshank *v.* Cruikshank, 1665, M., 11,489—Robertson *v.* Robertson, 1728, M., 11,471. (*s*) Hunter *v.* M'Alister, 1836, 15 S., 159. (*t*) Kyle *v.* Logan, 1594, M., 11,462—Common Seal *v.* Trail, 1611, M., ib.—Crawford *v.* Crawford, 1614, M., 11,463—Kinnaird *v.* Zeaman, 1682, M., 11,483, 11,469—Selkirk *v.* Inglis, 1686, M., 11,465—Mercer *v.* Dalgardno, 1694, M., 12,563—Houston *v.* Hamilton, 1708, M., 11,465—Hamilton *v.* L. Ormiston, 1712, M., 11,468—Muirhead *v.* Darniston, 1615, M., 6152—Blair *v.* Hamilton, 1714, M., 6110; compared with Fenton *v.* Skinner, 1673, M., 11,491. (*u*) Ersk., 3, 3, 93—Cases in M., 11,474–11,481. (*x*) Davidson *v.* Randal, 1706, M., 6966, 11,465—In Gallie *v.* Mackenzie, 1782, M., 11,374, and Fleming *v.* Gibson, 1661, M., 11,463, a bond of provision was held to be extinguished by a legacy. In Burnet *v.* Maitland, 1709, M., 11,467, a bond of provision for 4000 merks to a daughter was held to comprehend a previous one for 3000. See a similar decision, Mathieson *v.* Mathieson, 1766, M., 11,453.

his predecessors (*y*), for the better provision of the child in w
favour it was granted (*z*), and for love and favour (*a*). So the
cond deed may be regarded as an additional provision in co
quence of its being conditional, while the previous obligation is
so (*b*).[4]

§ 379. It is not sufficient to render outlays debts that they
been entered in the books of the party making them, or even
vouchers for them have been preserved (*c*); nor, on the other h
will the want of either or both of these circumstances be suffi
to prove that the outlays were meant as donations (*d*); bec
attention to these matters usually arises as much from bus
habits, as from any particular purpose in reference to the out
But such circumstances are relevant, and may sometimes turn
scale in the question of intention (*e*).

CHAPTER VII.—*CHIROGRAPHUM APUD DEBITOREM REPERTU PRESUMITUR SOLUTUM.*

§ 380. When a deed of obligation is found in the hands o
one of the obligants, it is presumed to have been implement
extinguished (*a*). This rule has peculiar force in regard to b
bills, and the like, which are frequently discharged by re-del

(*y*) Abernethy *v.* Forbes, 1676, M., 11,492—also Wemyss *v.* Murray, 17
11,493. (*z*) Ord *v.* Inneses, 1685, M., 11,492. (*a*) Fenton *v.* Sl
1673, M., 11,491—Dickson *v.* Dickson, 1671, M., 11,490, compared with Kinn
Zeaman, 1632, M., 11,463, 11,489, and Pringle *v.* Pringle, 1793, M., 11,472.

(*b*) Hunter *v.* M'Alister, *supra.* (*c*) See Scott *v.* Scott, 1846, 8 D.,
Campbell *v.* M'Alister, 1827, 5 S., 219—Wilson *v.* Paterson, 1826, 4 S., 817.

(*d*) See Fraser *v.* M'Gown, 1839, 2 D., 144—Black *v.* Booth, 1835, 14 S., 113

(*e*) See Buchanan *v.* Mollison, 1822, 1 S., 324 (new ed.); affd. 2 Sh. Ap. Ca.,
Farquharson's Tr. *v.* Stewart, 1841, 3 D., 658. (*a*) Stair, 1, 7, 14—ib., 4
—ib., 4, 45, 24—Ersk., 3, 4, 5—More, 126—Tait, 467.

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[4] A party had a property burdened with a debt to his sister. He made an a
conveyance to her of part of the property, and afterwards pleaded that the conv
was granted on the understanding that it was to operate a discharge of part of th
and he pleaded *debitor non presumitur donare.* But it was held that the presu
could not be pleaded against the words of the deed, which expressed an unqualifi
veyance; Ritchie *v.* Ritchie, 1858, 20 D., 1093.

without the interposition of writing (*b*). It has also been applied to obligations which affect heritage; as a heritable bond completed by infeftment and followed by assignation and relative sasine (*c*); and in the case of a back-bond of trust found uncancelled in the hands of the trustee (*d*). But this presumption does not hold as to such obligations regarding heritage as are not likely to be extinguished without deeds of retrocession; *e.g.*, in the case of a decree of apprising found in the hands of the debtor, where the Court refused to "take away heritable rights by presumptions and conjectures (*e*)." This presumption was held to apply where the cautioner in a bond had possession of it (*f*). And where an assignation which a party had granted in security of a debt due by his father, was found in the cedent's hands, the Court, in a competition between the cedent's creditors and the heir of the assignee, sustained the presumption in question against an offer to prove *prout de jure* that the cedent received the deed in order to use it as agent for the assignee (*g*). The presumption does not apply to bilateral deeds (*h*).[1]

§ 381. The presumption is excluded by the circumstance of the creditor holding a bond of corroboration or other deed which recognises the subsistence of the debt (*i*).

The rules as to the proof by which this presumption may be redargued are given afterwards in treating of the presumptions regarding the delivery of deeds.

(*b*) Monkton *v.* Carmichael, 1623, M., 11,404—Gordon *v.* Johnstone, 1703, M., 11,408—Campbell *v.* Cockburn, 1728, M., 11,534—Jackson *v.* Williamson, 1825, 4 S., 292. (*c*) Rollo *v.* Simpson, 1710, M., 11,411—Ersk., *supra.* (*d*) Charteris *v.* Charteris, 1712, M., 11,413. (*e*) Gordon *v.* Learmonth, 1684, M., 11,406, 16,181; 2 B. Sup., 57, S. C. (*f*) Monkton *v.* Carmichael, *supra*—Gordon *v.* Johnstone, *supra*—See Stair 1, 7, 14. (*g*) Fairley *v.* Dick, 1666, M., 12,278—Stair, ib. (*h*) Stewart *v.* Riddock, 1677, M., 11,406. See the chapters on delivery of deeds, *infra.* (*i*) M'Gowan *v.* Montgomery, 1703, M., 11,407—Brown *v.* Henderson, 1703, M., 11,408—See also Gordon *v.* Worlie, 1633, M., 4460.

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[1] A bill for value in furnishings, discounted by the drawer and retired by the acceptor, is in the hands of the acceptor proof that, to the extent of the sum in the bill, he has paid an account for furnishings due by him to the drawer at the date of the bill; Cumming *v.* Hendrie, 1861, 23 D., 1365.

Where a party, on the death of his creditor, averred that the debts had been gratuitously discharged, and in proof exhibited the receipts which he himself had granted, there was a conflict of two presumptions, the one in favour of discharge from possession of the documents, the other adverse to the alleged donation. The Court, in an action by the executors of the creditor, adjusted issues, of which the executors stood pursuers; Knox *v.* Crawford, *supra*, § 367, note [1].

CHAPTER VIII.—*CHIROGRAPHUM NON EXTANS PRESUMIT SOLUTUM.*

§ 382. When the creditor in a written obligation canno duce his document of debt, law presumes that it has been re to the debtor and cancelled on the debt being discharged, o the creditor cancelled it in order to extinguish the obligatio This presumption strikes at the existence of the deed as a g of obligation; but does not impair the subsistence of the de other and independent grounds. Accordingly, where a part granted bond for £84 sterling, and diligence had followed th and he had afterwards granted a new bond for a fifth part o sum, on a back-bond from the creditor providing that if the obligation were punctually implemented the former would b charged, but that if the sum contained in it were not punc paid at the stipulated terms, diligence should proceed on th ginal obligation, in which case the second bond would be give in an action for payment of the original bond, the Court held the non-production by the creditor of the second deed did not the presumption that the debt therein had been discharged consequently, as the condition in the back-bond had not been fied, they sustained the claim for the original debt (*b*). It w observed, however, that this was not a proper case of novati which the original obligation is extinguished on the second being substituted for it. In a case of novation the non-prod of the second deed would raise the presumption of payment o charge of the debt.

§ 383. This presumption can seldom be overcome witho action of proving the tenor of the missing document; in whic *casus amissionis* must be averred and proved. The rules o subject are noticed in treating of actions of proving the tenor.

(*a*) Swinton *v.* L. Tofts, 1679, 2 B. Sup., 246—More, 126—Tait, 468. S Ryrie *v.* Ryrie, 1840, 2 D., 1210, as explained in the Lord Ordinary's note.

(*b*) Goldie *v.* Poldean's Crs., 1737, Elch. "Presumption," No. 9.

CHAPTER IX.—OF THE PRESUMPTION ARISING FROM THE *APOCHA TRIUM ANNORUM.*

§ 384. In all obligations prestable by termly payments,—as rents, feu-duties, salaries, interest of money, and the like,—if the creditor has granted three consecutive written discharges for three corresponding terms' payments, all those previously due are presumed to have been settled (*a*). The reason is that, as a creditor seldom discharges even one term's debt while the debts of previous terms are outstanding, the existence of three consecutive discharges makes it highly improbable that the debts of previous terms were allowed to subsist. As, therefore, the presumption arises from the reiteration of independent receipts, it will not be raised by the existence of fewer than three discharges, although embracing three terms' dues (*b*). Nor will receipts for payments to account suffice; but if they were granted with reference to a particular term's payment, and amount to the full sum then due, it seems that they may be read as one receipt therefor (*c*); and where receipts for "the balance" of rent for five consecutive years respectively were produced, the presumption was held to apply (*d*).

§ 385. It is only consecutive receipts which raise this presumption; and therefore it does not apply where an unsettled term intervenes between the first and third discharge (*e*). The receipts require only to be for three consecutive terms, of half years or quarters, and not for three full years (*f*). The presumption does not arise from the granter receiving payment for three consecutive terms without granting written discharges; because one of the circumstances necessary to infer payment of the arrears is that the written acquittances do not reserve a claim to them (*g*).

§ 386. As this rule implies that the creditor wittingly granted the discharges, it has been held that two discharges granted by a father, and a third by his son and representative on his decease, do

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(*a*) Stair, 1, 18, 2—ib., 4, 40, 35—Ersk., 3, 4, 10—Bell's Pr., § 567—More, 123—Tait, 469. (*b*) Stair, 1, 18, 2—L. Rosyth *v.* Wood, 1631, M., 11,395.

(*c*) Blackadder *v.* Cockburn, 1687, M., 3552. (*d*) Hunter *v.* L. Kinnaird's Tr., 1829, 7 S., 548. (*e*) Stair, *supra*—Ersk., *supra*—and see Kennedy *v.* Dalrymple, 1622, M., 11,393. (*f*) Stair, *supra*—Ersk., *supra*—Tait, 469. The text writers do not state that the presumption is raised by successive receipts for less than half-yearly payments. (*g*) Stair, 1, 18, 2, and More's Notes, 123—Bell's Pr., § 567—Tait, 470—Moristoun *v.* Nisbet's Tenants, 1631, M., 11,394. But see *contra*, Lady Errol *v.* Cruickshanks, 1605, M., 11,392.

not raise the presumption, unless the son's knowledge o
vious receipts were proved (*h*). But the presumption
though two of the discharges were to the original debto
third to his representative (*i*).

§ 387. With regard to discharges by the creditor's fa
Stair observes that three subsequent discharges are only
against the chamberlain during his commission, and a
constituent who gave him power to discharge during tha
sion (*k*). In two cases the Court refused to infer payme
gones from the existence of three discharges by the
factor (*l*). But the opposite was found as to receipts for
by a factor and chamberlain who had been in use to upli
ditor's maills and duties (*m*), and as to receipts for rent b
tor who had framed the tenant's lease (*n*). The correct
seems to be that, while receipts by one who has a genera
ment of the property will suffice, it is otherwise as t
granted by one who merely acted as receiver of certain te
without holding such an office. Discharges by successi
will not raise the presumption; yet if combined with oth
stances, they may go far to infer payment (*o*).

Where tenants had by their landlord's order delive
grain rents to certain merchants, the receipts granted by
for three successive years were held not to infer payme
previous rents (*p*).

§ 388. The presumption from the *apocha trium anno*
rates in favour of the creditor, as well as of the debtor.
ingly, where the debtor in an annual-rent claimed repetiti
year's duty which he alleged he had paid twice, the Court
the creditor's defence that three subsequent payments
made without reservation (*r*).

§ 389. This presumption is excluded where the arr
been constituted by bond, bill, or decree; because the su

(*h*) Gray *v.* Reid, 1699, M., 11,399; 4 B. Sup., 466, S. C. (*i*)
v. L. Balgillo, 1631, M., 11,393. But see Lady Errol *v.* Cruickshanks, *supr*
(*k*) Stair, 1, 18, 2. (*l*) Preston *v.* Scott, 1667, M., 11,397—E.
Fraser, 1682, M., 3551, 11,399. The point did not arise purely in either of
See also Blackadder *v.* Cockburn, 1687, M., 3552, 3 B. Sup., 648—Grant
1757, M., 11,402. (*m*) Wedderburn *v.* Nisbet, 1612, M., 7181.
(*n*) Hunter *v.* Kinnaird's Tr., 1829, 7 S., 548. The point was not exp
here. (*o*) See Stair, 1, 18, 2, 1st ed., quoted in More's ed., p. 156,
(*p*) Master of Corstorphine *v.* his Tenants, 1686, M., 11,396.
Ogilvie, 1729, M., 11,400—More's Notes, 124.

of a debt so liquidated ought to be disproved by writing, or by a more conclusive inference than the one referred to (*s*).[1] Yet if the circumstance is confirmed by long delay to claim payment, or by other relevant facts, the arrears will be held to have been paid, even where they were constituted by writing (*t*).

§ 390. The presumption is limited to previous debts of the same character as those embraced by the discharges; and therefore receipts for rent will not raise the inference that grassums due once every five years, have been paid (*u*); although the receipts may be important in connection with other facts inferring payment (*x*).

§ 391. Where the receipts contain a reservation of the claim for arrears, of course it will not be presumed that these have been paid. The presumption may also be overcome by the debtor's writ or oath, and even by contrary circumstances sufficiently strong to infer non-payment (*y*).

CHAPTER X.—OF THE PRESUMPTION THAT HONORARIES HAVE BEEN PAID.

§ 392. Lord Bankton considers that advocates may sue for their fees, but that it is discreditable to do so (*a*). The correct view in point of law (whatever may be said of its equity or policy) is, that counsels' fees are honoraries, for which action does not lie (*b*).

(*s*) Ersk., 3, 4, 10—See also Master of Corstorphine *v.* his Tenants, *supra*—Pringle *v.* Murray, 1757, M., 11,403—L. Rosyth *v.* Wood, 1631, M., 11,395—More, 124—But the presumption is not excluded by a mere note or memorandum which is not a proper document of debt; M. Annandale *v.* Johnstone, 1728, M., 11,400. (*t*) Stair, 1, 18, 2—Ersk., *supra*—Grant *v.* M'Lean, 1757, M., 11,402—Douglas *v.* Bothwell, 1634, M., 11,395—Homes *v.* Anderson, 1744, M., 11,401. (*u*) See Lady Errol *v.* Cruickshanks, 1605, M., 11,392. (*x*) See Hunter *v.* L. Kinnaird's Tr., 1829, 7 S., 548. (*y*) Stair, 1, 18, 2—Ersk., 3, 4, 10—Cases *supra*, in notes.

(*a*) Bankt., 4, 3, 4. (*b*) Stair, 1, 12, 5—ib., 1, 13, 2—More, 126—Bell's Dic., "Honorarium"—Shand's Prac., 81. But an agent who has received payment from his client of fees as having been paid to counsel is bound to account to the counsel for them; Bell's Dic., ib.—A B, 1837, 15 S., 748, note. Now that the profession of an advocate is followed as a means of livelihood, and not as under the Roman system, whence the rule in the text is derived, there seems to be no good reason why a claim for remuneration should not be recognised by law.

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[1] Patrick *v.* Watt, 1859, 21 D., 687.

As professional etiquette requires fees to be paid in a
presumption is that this has been done (c). This p
however, does not hold where a salary is payable to a co
special agreement; in which case, also, the principle t
muneration is an honorary is inapplicable (d). Professo
generally that the presumption is excluded by a special
contract (e).[1]

§ 393. At one time physicians' fees also were r
honoraries, and as not exigible by action except unde
contract (f). But latterly this principle has been r
great extent; and the modern rule is that a physician
his fees, but that law presumes that his services have
rendered gratuitously or been remunerated at the time
ance (g). The presumption is held not to apply to atte
ing the deathbed sickness (h); which for this purpos
sometimes limited to the last sixty days of illness (i).
however, is not quite established (k).

§ 394. The presumption may be overcome by evid
or circumstantial (l); and it was held not to apply
physician's account for medicines was unpaid, and where
the custom of the district to pay the fees at the time

(c) Bell's Pr., § 568—Tait, 471. (d) M'Kenzie v. Town
1728, M., 11,421, 11,102—Lockhart v. D. Queensbery, note to ib., M., 1
evidently the case of Lockhart v. D. Gordon, 1730, M., 10,736; where a
allowed to sue on a bond of annuity narrating that it had been grante
done;" Kames' Session Papers, No. 447—See also Bell's Pr., § 568.
Pr., *supra*. (f) Stair, 1, 12, 5—ib., 1, 13, 2—Johnstone v.
11,418. (g) Tait, 471—Bell's Pr., *supra*. Cases in next two n
(h) Sanders v. Hewat, 1822, 1 S., 310 (new ed.)—Russell v. Dun
11,419—Malcolm v. Balfour, 1744, Elch., "Presumption," 15—Park v. La
1755, M., 11,421; and see Hamilton v. Gibson, 1781, M., 11,422—Bell's
(i) Russell v. Dunbar, *supra*—Tait, 471. (k) See per
Sanders v. Hewat, *supra*, and Park v. Langlands, *supra*. (l)
Gibson, 1781, M., 11,423, where an action was brought for fees for attenda
the patient's last illness, the Court, while recognising the general princip
particular circumstances may make an exception," and accordingly the
defence. The nature of the circumstances is not reported.

[1] In England, a barrister has no action for his fees; he undertakes a
not enter into a contract; Swinfen v. Chelmsford, 1860, 5 Hurl. and Nor
recent case where an advocate sued an agent for fees alleged to have
by the agent from his clients, and not paid to the advocate, the Court de
of the question, whether an advocate could sue for fees, and allowed
answer; Cullen v. Buchanan, 1862, 24 D., 1132.

ance (*m*). The presumption ought not to hold in Scotland in regard to the fees of the ordinary medical attendant of a family, the usual practice being to pay such bills once a year (*n*).

CHAPTER XI.—OF THE PRESUMPTION THAT PAYMENT WAS MADE BY THE PROPER DEBTOR.

§ 395. Where a debt has been paid, the natural inference, and consequently the legal presumption, is that it has been paid by the debtor or with his funds (*a*).

Thus a bill or promissory note with a general receipt is presumed to have been retired with the acceptor's or granter's money (*b*). So a bill for the acceptor's accommodation, with a general receipt by a bank (the last indorsee), was presumed to have been paid by the acceptor or on his behalf; the question arising between the drawer and a prior indorsee in whose possession the bill was found with the receipt scored (*c*). And where a bill for the accommodation of a party not appearing on it, having been retired and marked paid, was found in the hands of one of the acceptors, in a question between him and a co-acceptor's heirs it was presumed to have been retired with the funds of the true debtor (*d*). And a bill by two acceptors, being found blank indorsed in the hands of one of them, was presumed to have been paid by them equally (*e*). But where a bill accepted by a father and son was found in the father's hands, and in a competition of the son's creditors the father claimed repayment of the whole, on the ground that the bill had been for the son's accommodation, the Court held that it must be presumed that the payment had been made with the funds of the son (*f*). Again, where a party alleged that he had paid another person's debt, and produced receipts in that person's name, which he had retained undelivered, he was obliged to prove by the debtor's writ or oath that

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(*m*) Flint *v.* Alexander, 1795, M., 11,422—Melville *v.* Alexander, 1795, note to ibid.

(*n*) See Bell's Pr., § 568. (*a*) Ersk., 3, 4, 6—Bell's Pr., § 559—More, 126—Tait, 472. (*b*) Ewing *v.* E. Strathmore, 1832, 10 S., 863—Webster *v.* Thomas, 15th January 1819, F. C.—Ferguson *v.* Young, 1793, M., 1488. (*c*) Brown *v.* Kerr, 1809, Hume D., 62. (*d*) Jackson *v.* Williamson, 1825, 4 S., 292.

(*e*) Campbell *v.* Cockburn, 1728, M., 11,534. (*f*) Baillie *v.* Wilson, 1840, 2 D., 495. In this case the father and son had evidently been in collusion.

the payment had not been made from the funds of the latte
A heritable bond lying cancelled in the hands of the debtor'
was presumed to have been paid by him, not by the executo
Thus also a tenant was not allowed credit as against his lan
for payments, the receipts for which, produced by him, were i
landlord's name (*i*). And a factor's possession of bonds and
granted by his constituent does not raise the inference tha
factor paid them (*k*). Again, where A subscribed the book
joint stock company for certain shares of stock for himsel
other persons respectively, and paid the advances upon their s
whereupon a certificate was made out bearing these parties
creditors of the company for the sums so paid up, it was pres
that the several parties had advanced the sums applicable to
respective shares (*l*). The presumption applies although the
ment was made by the hands of a third party who holds a r
to that effect (*m*). And where certain receipts for annual-re
the hands of one or two creditors bore that the sums therein
tioned had been paid by him for himself and in name and for b
of the other debtor, the Court held that the latter had contri
his proportion of these payments. There were other receipts i
hands of the same party bearing simply that the sums had
paid by him; and it was not contested that he had made these
ments from his own funds (*n*).

§ 396. This presumption may be overcome by the terms
receipt (*o*). Indeed one of the grounds of the presumption is
if a party pays with his own funds the debt due by anothe
ought to take a receipt setting forth that fact. The presum
may also be overcome by the writ or oath of the proper debto

(*g*) Halyburton *v.* Cook, 1711, M., 11,528. (*h*) Wilson *v.* Dawling
M., 11,525. (*i*) Nisbet *v.* Johnston, 1711, M., 11,528. See Veitch *v.* Pa
1664, M., 11,383. (*k*) Garnock *v.* Wilson, 1714, M., 11,530.

(*l*) Corse's Crs. *v.* Peddie, 1708, M., 11,526. (*m*) Trotter *v.* Robertson
M., 11,526—Donaldson *v.* Walker, 1711, M., 11,528—Corse's Crs. v. Peddie, *supr*
also Nisbet *v.* Johnston, *supra.* (*n*) Gordon *v.* M'Ghie, 1711, M., 11,52

(*o*) See Soutar *v.* Soutar, 1827, 5 S., 876, where an accommodation bill havin
paid in two instalments by one of the parties who was not the proper debtor in
receipt for the first instalment being in general terms, while on the balance bei
the bill and protest were given up to the party and a receipt was written on the
these terms, "Received payment from G. S. as indorsee;" the Court held th
payments had been made by him. A written declaration, however, by the cre
intervallo will not be regarded; indeed it is inadmissible as evidence to any effect
Nisbet *v.* Johnston, *supra.* (*p*) Trotter *v.* Robertson, 1672, M., 11,526—
Crs. *v.* Peddie, 1708, M., ib.—Halyburton *v.* Cook, 1711, M., 11,528—Ferguson *v.*
1793, M., 1488—Ewing *v.* E. Strathmore, 1832, 10 S., 863; aff'd., 6 W. S., 56.

which was formerly regarded as the only admissible proof on the point (*r*). But the later cases allow it to be redargued by a proof *prout de jure*, or by contrary inferences (*s*). But in a recent case it was held that a bill of exchange, bearing a general receipt of payment by the last indorsee, and having the names of the acceptors cancelled, cannot found an action by a prior indorsee into whose hands it comes, and who averred that the bill was retired by him, unless he prove his averments as to the payment, cancellation, and receipt, by the acceptors' writ or oath (*t*).

CHAPTER XII.—*TUTOR PRESUMITUR INTUS HABERE ANTE REDDITAS RATIONES.*

§ 397. Law presumes that a tutor, who has not accounted for his intromissions, has in his hands funds belonging to the pupil sufficient to meet any claim which he may have against the pupil's estate (*a*). This is a corollary to the rule that tutors are not bound to account till their office expires; and it has a wholesome tendency to produce an early accounting, as well as to prevent tutors from speculating on their own account with the funds under their official care (*b*). This presumption is twofold—1*st*, that the tutor holds funds sufficient to meet any claim he may have against the pupil (*c*); and, 2*d*, that all purchases by him of rights affecting the pupil's estate were made with the pupil's money (*d*). It applies in an action by a tutor against his ward after the decennial prescription has extinguished his liability to account for his intromissions; for *quae sunt temporalia ad agendum* are frequently *perpetua ad excipiendum;* and the pupil does not claim a balance from the tutor, but only

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(*r*) Trotter *v.* Robertson—Corse's Crs. *v.* Peddie—Halyburton *v.* Cook, *supra.* And see *per curiam* in Ferguson *v.* Young, *supra.* (*s*) Halyburton *v.* Cook, 1713, M., 11,387—Macneil *v.* Livingstone, 1758, M., 11,534—M'Nab *v.* Telfer, 1821, 2 Mur., 481—M'Lauchlan *v.* Thomson, 1831, 6 F. C., 490; 9 S., 753, S. C.—M'Kenzie *v.* Gordon, 1839, M'L. & Rob., 117, affirming 16 S., 311—Wood *v.* Northern Reversion Co., 1848, 11 D., 254. See also Irving *v.* Charteris, 1714, M., 11,531. (*t*) Martin *v.* Smith, 1854, 17 D., 143. (*a*) Stair, 1, 6, 28—Ersk., 1, 7, 32—2 Fraser, 166, 7—Tait, 473. (*b*) See Ersk., 1, 7, 19. (*c*) Tait, 473—Authorities in note (*a*). (*d*) Bankt., 1, 7, 40—Ersk., *supra*—Tait, *supra*—Fraser, *supra*—Tutor of Stormont *v.* his pupil, 1662, M., 11,524—Melville *v.* Montgomery, 1676, M., 16,292—Cases in two next notes.

pleads in defence that the claim of the latter is presu
been paid before the years of prescription had ela
sumption which must be available to him until the
counted (*e*).

§ 398. This presumption affects not only the t
onerous assignees holding bonds or securities which
pil's estate (*f*). But it does not apply to debts due to
the pupil's ancestor; because the only rational founda
stricts it to expense incurred by the tutor on the min
and it is repugnant to justice that a creditor's right
just debt should be postponed, in consequence of his l
taken a friendly and gratuitous office for his debtor; *q*
debet esse damnosum (*g*). In the same way the presun
affect rights which a tutor acquired over his ward's est
office commenced; for he had not then funds belongin
with which they could have been purchased.

§ 399. The presumption applies to one who takes
pro-tutor (*h*).

§ 400. This presumption will be overcome by t
counts showing that he had not the requisite funds in
make the payment or purchase the debt objected t
also be redargued by proof that the pupil's father died
and insolvent (the pupil not having acquired funds
quarter), and that the tutor while in office had advan
prevent the pupil's estate, which was heavily burdene
dismembered by diligence (*k*). Stair (*l*) and Bankt
case of the Earl of Wintoun *v.* Ramsay (*n*), to show t
nee of a tutor, who had acquired a bond over his pupi
ing the tutory, may get decree against the latter on fi
to repeat, in case the tutor's accounts should show that
in hand wherewith to have paid the debt. But in th
pears that the defender offered to pay the sum to th

(*e*) Ersk., 1, 7, 32—Bankt., 1, 7, 40—Baillie *v.* Baillie, 1714, M., 1
Scott, 1737, Elch. "Tutor," No. 8; M., 10,004, S. C. (*f*)
ib., 1, 6, 28—M'Dougall *v.* Applecross, 1686, M., 16,308—Ramsay *v.* W
9977—Cleland *v.* Baillie, 1679, M., 9983—Spence *v.* Scott, 1676, M.,
Cook, 1714, M., 9998. See Nisbet *v.* Smith, 1685, 3 B. Sup., 594.
1, 7, 32—Bankt., 1, 7, 40—Newmills *v.* Smiths, 1687, M., 9989—Muir
4 B. Sup., 298. (*h*) Buchanan *v.* Buchanan, 1765, M.,
Tolquhoun, 1686, M., 16,308—Nisbet *v.* Smith, *supra.* (*i*)
Ersk., 1, 7, 32. (*k*) Buchanan *v.* Buchanan, *supra.*
(*m*) Bankt., 1, 7, 40. (*n*) E. Wintoun *v.* Ramsay, 1662,

his finding the caution referred to, and that the tutor was only one of several, and had not personally intromitted with his ward's funds (*o*).

(*o*) In the argument of Nisbet *v.* Smith, 1685, 3 B. Sup., 595, with regard to assignees of tutors, it is mentioned that the decisions E. Wintoun *v.* Ramsay and Grierson *v.* Carruthers (unreported), only "tie them to find caution." But little or no reliance can be placed on the latter case, especially from its being coupled with the case of E. Wintoun *v.* Ramsay, *supra;* which, as already shown, was not a decision on the point.

TITLE IX.

OF PRESCRIPTIONS.

CHAPTER I.—OF THE GENERAL NATURE OF PRESCRIPTIONS.

§ 401. The lapse of time has important effects in establishing or extinguishing, fortifying or impairing, rights and obligations. Besides the inferences which spring from undisturbed possession on the one hand, and *mora* and acquiescence on the other, all codes of law recognise absolute rules on this head; founded partly on presumptions, and partly on grounds of public policy. In this country these rules pass under the general term "prescriptions;" although some of them are more correctly called "limitations." Prescriptions, then, may be defined as rules of law by which rights and obligations are established or extinguished, or the modes of proving them are limited, in consequence of the lapse of time.

§ 402. From this definition it is manifest that prescriptions are of several essentially different kinds. They may be classified into—

1. Those by which rights are fortified and established; *e.g.*, the long positive prescription, and the vicennial prescription of retours. Such prescriptions are founded on the presumption which arises from undisturbed possession; and they are designed not only to protect true proprietors from the forgery of competing titles, but also to give that confidence in the stability of rights of property, which is essential to its improvement, and to the prosecution of useful enterprises engaged in upon the faith of it (*a*).

2. Prescriptions which, proceeding on the presumption that the creditor has relinquished his right, absolutely extinguish it, if it has not been prosecuted within the prescriptive period; *e.g.*, the long negative prescription.

(*a*) Dig., 41, 3, 1—Stair, 2, 12, 9—Ersk., 3, 7, 1

3. Prescriptions which proceed on the presumption, or rather the fiction, that the obligant and obligee at entering into the contract intended that it should only last for a limited period; and which are therefore implied conditions defining its duration; *e.g.*, the septennial limitation of cautionary obligations.

4. Prescriptions which are designed to protect from the perpetuity of certain diligences and actions; *e.g.*, the triennial limitations of arrestments and actions for wrongous imprisonment and spuilzies, and the vicennial prescription of criminal prosecutions;—and

5. Those which do not affect the right or obligation, but which, in order to obviate the evils arising from loss of evidence, limit the proof either to the oath or to the writ or oath of the party in whose favour they run; *e.g.*, the vicennial prescription of holograph writs, the sexennial prescription of bills, and the triennial prescription of merchant's accounts; all of which spring from corresponding presumptions.

§ 403. It is only the last class of prescriptions which directly involve questions on the law of evidence; and therefore it is only these which will here be examined in detail. Before entering upon them, the other prescriptions may be enumerated.

§ 404. 1. The long positive prescription was introduced by 1617, c. 12, for the protection of land rights. Under it possession for forty years on charter and sasine, or (where there is no charter) on sasines one or more continued and standing together, renders the right secure against all future challenge (*b*).

2. Undisturbed possession of a moveable subject for forty years, either with or without a written title, creates an indefeasible right of property in it (*c*). Whence this rule arises has been a moot point among Scotch lawyers. It does not come within the enactments regarding the long positive prescription; for these are limited to heritable subjects possessed on written titles. It has been maintained (*d*) under the long negative prescription noticed in next paragraph. But as the statutes by which that prescription is introduced speak only of obligations "made" in favour of the party against whom the prescriptions run, their provisions seem not to apply to the claim by the original proprietor of a moveable subject to vindicate his right of property. The correct principle seems to be, that justice and public policy requiring that some fixed period

(*b*) See this treated in Ersk., 3, 7, 3, *et seq.*—More, 276—Bell's Pr., § 2002.

(*c*) Stair, 2, 12, 2—Ersk., 3, 7, 7—More, 276. (*d*) See Napier on Prescriptions, 38, *et seq.*—Ib., 76, *et seq.*

of possession of moveables be sufficient to create an absolute right of property in them, common law has, on the analogy of the long prescriptions, established a presumption *juris et de jure*, that a party who has for forty years possessed a moveable subject is the proprietor of it (*e*).

3. The long negative prescription stands upon the statutes 1469, c. 28, 1474, c. 54, and 1617, c. 12; which create forfeiture of a right or obligation, heritable or moveable, mutual or unilateral, which the creditor has neglected to exercise or prosecute for forty years (*f*). It proceeds on the presumption of abandonment.

4. By 1617, c. 13, retours of services can only be challenged if the summons of reduction is "intented, executed, and pursued" within twenty years of the retour and service (*g*). The decree of service under the new form of procedure has the benefit of the statute in the same manner as the old retours (*h*).

5. By common law the right to prosecute criminally prescribes after twenty years from the date of the offence, unless the accused has been fugitated (*i*).

6. By 1696, c. 9, actions of count and reckoning competent to pupils and minors against their tutors and curators prescribe if not insisted in within ten years after majority (*k*).

7. By 1695, c. 5, the duration of cautionary obligations is, under certain conditions, limited to seven years (*l*).

8. By 1669, c. 10, citations for interrupting prescriptions prescribe in seven years.

9. By 1701, c. 6, the right to raise action for wrongous imprisonment prescribes, if it is not exercised within three years after the last day of the imprisonment (*m*). This applies only to actions for the statutory penalties, and not to actions at common law for damages (*n*). It is also limited to wrongous imprisonment on criminal charges, and does not include imprisonment for civil debts (*o*).

10. Actions for error against the persons of inquest were only competent within three years from the date of the retour and service (*p*).

(*e*) See Stair, 2, 12, 13—Bankt., 2, 12, 1—Kames' Elucid., Art. 33, p. 240, 258—More, 276. (*f*) See Ersk., 3, 7, 8—More, 265—1 Bell's Com., 335—Bell's Pr., 606. (*g*) See Ersk, 3, 7, 19—More, 271—Bell's Pr., 2024.

(*h*) 10 and 11 Vict., c. 47, § 13—Duff on Recent Stat., p. 53. (*i*) 2 Hume, 136—2 Al., 97—Macgregor (Murder), 1773, Hume, ib.—Ersk., 4, 4, 109.

(*k*) See Ersk., 3, 7, 25—More, 272—Bell's Pr., 685—See *supra*, § 397.

(*l*) See Ersk., 3, 7, 22—More, 272—1 Bell's Com. 356. (*m*) See Ersk., 4, 4, 110. (*n*) Bell's Pr., § 2085—Sinclair *v.* Sinclair, 1742, Elch., "Wrongous Imp.," 9. (*o*) M'Christie *v.* Fisher, 1831, 9 S., 312. (*p*) 1494, c. 57—1617, c. 13.

11. Arrestments prescribe within three years from laying them on, when the debt is liquid; and when it is future or contingent, they prescribe within three years respectively from its becoming due or the contingency being purified (*r*).

12. Actions of removing can only be pursued within three years after their respective warnings (*s*).

13. "Actions of spuilzies, ejections, and others of that nature" (which include actions of intrusion (*t*), of "damages for demolishing a mill" (*u*), and the like), must be pursued "within three years after the committing thereof" (*x*). This prescription does not affect an ordinary action for restitution of the loss occasioned by the spuilzie, but only the action for violent profits (*y*).

§ 405. The prescriptions which are more particularly examined here are the vicennial prescription of holograph writs, the sexennial of bills, the quinquennial of verbal bargains and of maills and duties, and the triennial of open accounts. The first of these prescriptions is founded upon the presumption that if a writ alleged to be holograph has not been claimed upon for twenty years, it is not genuine. The others proceed upon the double presumption that from the lapse of the statutory period the alleged obligation was not contracted, or that, if it was, it has been implemented or discharged. But "whatever general presumptions may have weighed with the Legislature in passing the statutes which enact these prescriptions, they introduce no presumptions, but enact certain specific and imperative rules on the subject of probation" (*z*).

§ 406. The cases, therefore, which arise on these limitations involve two questions; namely, 1*st*, Does the document or claim come under the statutory rule? And, 2*d*, If so, has the pursuer proved his case by evidence of the kind to which he is limited? Thus, when the vicennial prescription is pleaded in an action upon a holograph bond, it may be necessary under the first head to determine whether the writing is one of those struck at by the statute, whether the full twenty years have run without minority or any other impediment, and whether the defence has been elided by

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(*r*) 1 and 2 Vict., c. 114, § 22. They formerly prescribed in five years; 1669, c. 9.

(*s*) 1579, c. 82. See Erak., 3, 7, 18.

(*t*) L. Craighall *v.* Kinninmonth, 1610, M., 11,068.

(*u*) Corbet *v.* Vans, 1610, M., 11,068.

(*x*) 1579, c. 81. See Erak., 3, 7, 16.

(*y*) Erak., ib.—Baillie *v.* Young, 1835, 13 S., 472—Cases in 3 B. Synop., 1650.

(*z*) L. Fullerton in Darnley *v.* Kirkwood, 1845, 7 D., 600. See also per L. Just.-Cl. Hope in Alcock *v.* Easson, 1842, 5 ib., 363, 4—Cullen *v.* Smeal, 1853, 15 ib., 870.

action or diligence. Then, if it shall be found that the statutory rule applies, the next point is whether the pursuer has proved the genuineness of the bond by the defender's oath; and this may raise questions as to the interpretation of the oath, the effect of one defender's oath against another, and the like. Similar questions are involved in cases regarding the sexennial, quinquennial, and triennial prescriptions; where the first point is,—Does the case come under the statutory rule which limits the pursuer's proof to the defender's writ or oath? and the second point is,—If so, has the pursuer, by means of that evidence, proved both the constitution and the subsistence of the debt (*a*)?

§ 407. With regard to all the statutes referred to, the defender's admissions on record are held to be equally binding upon him as his writ or oath; and that not so much from their being equivalent to either of these kinds of proof, as in consequence of the fundamental rule of pleading, that the statements of fact made by a party on record are conclusive against him (*b*).

§ 408. Great caution, however, is required in using the record in place of the statutory mode of proof. On the one hand, there is no doubt that if the defender distinctly admits that the bond is genuine, or that the debt is resting-owing, it will not avail him to plead prescription, but decree will be given against him without a reference to his oath (*c*). The same course ought also to be followed in an action on a prescribed bill or account, when the defender distinctly admits that the debt is resting-owing, and states a defence independent of any question as to its subsistence (*d*). But if the defender in such an action, without admitting resting-owing, pleads

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(*a*) The observations in this paragraph are taken from the cases of Alcock *v.* Easson, 1842, 5 D., 356, per L. Justice-Clerk Hope (which is the leading decision on this subject), and Darnley *v.* Kirkwood, 1845, 7 D., 595, per Lord Fullerton. The application of these rules to the different prescriptions is considered in treating of them.

(*b*) Noble *v.* Scott, 1843, 5 D., 727—Alcock *v.* Easson, *supra*—Darnley *v.* Kirkwood, *supra*—Wilson *v.* Strang, 1830, 8 S., 625. (*c*) Bryson *v.* Aytoun, 1825, 4 S., 180—Ritchie *v.* Little, 1836, 14 S., 216—Alcock *v.* Easson, *supra*, per L. Justice-Clerk.

(*d*) For instance, if the defender admits that the debt was incurred and has not been paid or discharged, but pleads compensation, the admission should be held to prove the constitution and subsistence of the debt, the defender being left to prove his counter-claim; because, if his oath were taken, he would not be allowed to contradict his statement on record, and if he repeated the statement in his oath with the qualification of set-off, the Court would find the debt proved, but would require him to prove the counter-claim, which would be an extrinsic qualification to his oath. This course, however, is not to be followed where the defender on record pleads compensation without admitting the debt. See the text.

on record, 1*st*, prescription, and 2*d*, an alternative defence (such as compensation), which can only operate on the supposition that the debt is resting-owing, the pursuer may not maintain that this second plea involves an admission of the debt, and thereby proves it. The defender's position in such a case is, 1*st*, that the debt is prescribed, which means that resting-owing is denied, and can only be proved by his own writ or oath; and 2*d*, supposing that he fails in that plea in consequence of the debt being held not prescribed, or from his writ or oath being held to prove resting-owing, —then, and not till then, comes in the alternative defence, "*esto* that resting-owing shall be proved, decree may not be given against me, because the debt is compensated," or is not exigible on some other ground. The burden of proving that defence then lies upon him; and if he does not instruct it, decree will be given against him. In such a form of pleading, therefore, if the case comes within the statutory rule, the proper course is to find that, in terms of the statute, the debt can only be proved by the defender's writ or oath on reference, and to allow the pursuer to adduce such a proof accordingly. If the debt is not proved by these means, of course the defender gets absolvitor. If it is proved, his alternative plea (*e.g.*, of compensation) will come to be considered (*e*). The course adopted in some cases, of finding that the prescription is elided by the statements relating to the alternative defence, or that it does not apply to the circumstances of the case, is plainly erroneous, and has been reprobated in the recent and most authoritative decisions (*f*). It is also erroneous to find in any case that, as the con-

(*e*) Several erroneous decisions on this head may be traced to the rule which requires a defender to state all his grounds of defence at once, although some of them may be prejudicial to the others. Were it not for this rule, a party sued for payment of a prescribed bill or account would first plead a general denial of the debt, and maintain that the only competent proof against him is his own writ or oath; and afterwards, if it were held either that the statute on which he founded did not apply to the case, or that the debt was proved by his writ or oath, he would propone his other defence, *e.g.*, of compensation. Great care therefore is requisite, lest the rule of practice, which requires the whole defences to be pleaded at once, should deprive the defender of his right to maintain that the general statutory rule, founded on the nature of the case as one of a privileged class, shall be applied *ante omnia*, and as prejudicial to any consideration whatever of the circumstances of the individual case. See this fully considered in Alcock *v.* Easson, 1842, 5 D., 366, by Lord Justice-Clerk Hope, where his Lordship mentions that Lord Chancellor Eldon greatly objected to the rule of pleading referred to, on account of its tendency to deprive the defender of the proper effect of his prejudicial pleas. See also Campbell *v.* Grierson, 1848, 10 D., 361. (*f*) Alcock *v.* Easson, *supra*—Campbell *v.* Grierson, *supra*.

stitution of the debt is admitted and payment is not averred, the debt is resting-owing; because the plea of prescription necessarily implies a denial of resting-owing (*g*).

§ 409. When the admission on record is qualified, effect must be given to the whole of it, and unless it proves the subsistence of the debt, the defence of prescription must be sustained. It is incompetent to contradict the qualification by evidence *prout de jure*, or to reject it as improbable, and, on the admission being thus cleared of the qualification, to hold that it proves the debt (*h*).

In fine, the point to be determined, both in the vicennial prescriptions and the shorter prescriptions above mentioned, is not whether the deed is genuine or the debt due, but whether these facts respectively are admitted by the defender on record, or by writ or oath.

§ 410. A defender allowing decree in absence to go against him after the prescriptive period may open it up and plead prescription; a decree in absence not importing the statutory admission (*i*).

§ 411. As these prescriptions or limitations are designed for the protection of defenders, and are in their nature prejudicial to the rest of the case, they must be maintained *tempestivé*. If they are waived, or are omitted until an order for a proof *prout de jure* has been granted and acquiesced in, or if, after having been pleaded, they have been abandoned, they may not be maintained on the defender finding that the evidence is unfavourable to him (*k*). This kind of defence ought also to be sustained or repelled at the threshold of the case (*l*); and a proof *prout de jure* before answer should never be allowed, because the very object of the statute and corresponding plea is to exclude that mode of investigation as inconclusive and apt to mislead (*m*).

These remarks will have cleared the way for a detailed consideration of the limitations or prescriptions referred to.

(*g*) Alcock *v.* Easson, *supra*.—Campbell *v.* Grierson, *supra*. (*h*) Alcock *v.* Easson, *supra*. (*i*) Cases noted *infra*, § 453. (*k*) Ker *v.* Woods, 1832, 10 S., 774—M'Naughton *v.* M'Naughton, 1813, Hume D., 396. See also Maule *v.* Somers, 1822, 1 S., 514—Smellie *v.* Gillespie, 1833, 12 S., 125, as referred to in L. Ordinary's Note in Smellie *v.* Cochrane, 1835, 13 S., 544. (*l*) Per L. Justice-Clerk in Alcock *v.* Easson, *supra*, 1842, 5 D., 356—Rose *v.* M'Leod, 1828, 7 S., 140. (*m*) Alcock *v.* Easson, *supra*.

CHAPTER II.—OF THE VICENNIAL PRESCRIPTION OF HOLOGRAPH WRITS.

§ 412. The Act 1669, c. 9, provides "that holograph missive letters and holograph bonds and subscriptions in compt books without witnesses, not being pursued for within twenty years, shall prescribe in all time thereafter, except the pursuer offer to prove by the defender's oath the verity of the saids holograph bonds and letters, and subscriptions in the compt books."

§ 413. The object of this statute is to prevent fabricated documents of obligation from being received as holograph, after the means of detecting the fraud have been destroyed or impaired by lapse of time. Nor is there any inconsistency between the privilege and the prescription applicable to holograph writs; for, while the extreme difficulty of successfully forging a person's handwriting throughout a deed makes it safe and proper to dispense with the attestation of witnesses to such writings, yet, as the means of detecting and proving forgery are perishable, the duration of the privilege ought to be limited.

§ 414. This Act applies only to specific kinds of holograph writings, namely, "holograph missive letters, and holograph bonds and subscriptions in compt books without witnesses." In one case the following question arose—Lord Breadalbane having a recommendation from the Scotch Privy Council to the Lords of the Treasury for payment of £300, had delivered it to Sir Patrick Murray (who was then Receiver-General), with a note appended to it bearing that the contents had been received by him from Sir Patrick, who, on the other hand, granted his Lordship a holograph acknowledgment bearing that the £300 was stated in his accounts, and that if the same were allowed by the auditors, the money would be paid to his Lordship. The article was passed by the auditors, and in the fortieth year thereafter, Lord Breadalbane's heir claimed the amount from the representatives of Sir Patrick. The defender having pleaded, *inter alia*, the vicennial prescription; to which the pursuer answered that the document did not come within any of the classes specified in the statute; the Court first sustained the defence on the statute, but afterwards modified this view, and found that, in the whole circumstances of the case, no action lay for the sum sued for; and the House of Lords on appeal affirmed

the latter judgment (*a*). In a case reported by Lord Monboddo, "the Lords found that a holograph paper after twenty years could not prove any fact tending to establish an obligation, and was to be considered in every respect as good for nothing, unless supported as the law directs" (*b*). It seems, however, that this decision was not meant to extend the prescription to other documents than those specified in the statute, but to show that it applied wherever a document falling within any of the statutory definitions was adduced after the twenty years in evidence of an obligation.[1]

§ 415. The Act is only directed against writings "pursued for" after the twenty years. It does not affect documents used to instruct a defence, as payment or discharge. Whether it applies to writings founded on after the twenty years to prove a defence of compensation, which partakes of the nature of a counter-suit, has not been settled (*c*).

§ 416. This prescription is excluded by an action raised upon the holograph writ within the twenty years (*d*), although the document was not produced in Court during the process (*e*). But the running of a counter-claim on the debt contained in the writing will not prevent the statute from operating upon it (*f*), although pleading compensation upon the debt within the twenty years will

(*a*) Campbell *v.* Halkett, 1747, M., 11,634, Elch., "Prescription," No. 29, S.C.; affd. Cr. and St., 427. (*b*) Bank of Scotland *v.* ———, 1747, 5 B. Sup., 748. The remainder of the report bears, "This case was put,—Suppose a holograph letter or declaration twenty years old produced to instruct that an assignation was in trust; it would signify nothing though the obligation would not arise in such a case from the paper, but from the trust of which the paper was only a proof."

(*c*) The quinquennial and triennial prescriptions apply to defences of compensation, as well as to actions on the obligation. See *infra*. (*d*) Act *supra*, § 412.

(*e*) Simpson *v.* Brown, 1791, Bell's Octavo Ca., 883. (*f*) Walkinshaw *v.* Knapperny, 1737, Elch., "Prescription," No. 15.

[1] The Act seems to apply to all holograph writings on which an obligation can be founded. A pursuer raised an action against the heir of his deceased brother, concluding alternatively for constitution of a sum of money advanced to the deceased brother, as a debt against his heir, or for conveyance of certain heritable subjects. As to these heritable subjects, he averred that there had been a joint purchase by himself and his brother, that his brother had agreed to convey his share to the pursuer on payment of a sum of money, and that the pursuer had paid the sum concluded for. The pursuer founded on letters which he said were holograph of his brother; and in one of which receipt of a large part of the sum concluded for was admitted, but the date of the last of the letters was more than twenty years prior to the date of the action. In these circumstances the plea of vicennial prescription was sustained; and the Court found that the letters could not be founded on "unless the pursuer offered to prove the verity thereof by the defender's oath"; Mowat *v.* Banks, 1856, 18 D., 1093.

do so (*g*). The effect of the document is preserved by raising diligence, as well as by suing, upon it; but merely registering it with a view to charge the debtor will not suffice (*h*). Nor is a suspension of a threatened charge upon the writ sufficient, being an act of the alleged debtor in anticipation of diligence which he meant to resist (*i*).

§ 417. Professor More (*k*) observes, that it "is generally agreed that, to keep alive a holograph bond or other deed, it is not necessary that any action or diligence should be raised upon it within the twenty years, provided it has all along been acted upon and recognised as a binding obligation, by the payment of interest or otherwise. It is held to be 'pursued for' within the statutory period by such acts recognising its validity, and the statute seems to contemplate cases where nothing has taken place or been done under the document for twenty years." But this view, however just and equitable, seems hardly to be consistent with the terms of the statute (*l*).

§ 418. The effect of action or diligence on the document is to exclude the operation of the statute, and to keep the writ in force until it be extinguished by the long negative prescription, or be discharged (*m*). Mr More considers that payment of interest upon the writ should have the same effect (*n*).

§ 419. The twenty years commence at the date of the document, although the obligation under it be future or contingent (*o*). They do not run against minors during their minority (*p*).

§ 420. The statute does not extinguish the debt or obligation, but only the holograph writ as proof of it; and if the creditor prove the "verity"—that is, the holograph quality of the "bond and letter"—by the debtor's oath on reference, its full effect will be restored (*r*). It is not enough merely to prove that the subscription is genuine; for that would only put the writ into the position of

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(*g*) *Infra*, § 435. (*h*) Wright *v.* Wright, 1717, M., 11,268.

(*i*) Wright *v.* Wright, *supra*. (*k*) More, 271. (*l*) It certainly seems absurd that a payment under compulsion, or a decree in absence, should exclude the prescription; while a voluntary payment, which is the strongest recognition of the authenticity of an obligatory document, should not have that effect. In this view of the law, not only would a document on which interest had been paid for nineteen years prescribe in the twentieth, but payment of interest continued after the twenty years have run would not bar prescription. Perhaps the writs in such cases may be sustained on the ground of *rei interventus* or homologation, or of personal exception against the defender pleading the statutory rule. (*m*) Act cited *supra*, § 412.

(*n*) More, 271. (*o*) Act quoted *supra*, § 412—Home *v.* Donaldson, 1778, M., 10,992—More, 271. (*p*) Act quoted § 412. (*r*) Ib.

one signed but improbative (*s*). The "subscriptions" in the count books, however, are effectual if their genuineness is proved by the party's oath on reference (*t*).

No case seems to have arisen as to the effect of the defender having admitted by writ that the document is genuine.

§ 421. Where the original obligant has died, reference may be made to the oath of his heir, who may have complete personal knowledge of the fact in issue (*u*).[2] But it is not enough for the creditor to prove in this way the heir's opinion or inference from *comparatio literarum* or other circumstances, that the document is genuine; for the statute contemplates the party's oath of knowledge, not of mere credulity (*v*). Yet, where the heir deponed that, looking to the circumstances, "he could not have a doubt upon the point," although he could not swear positively to the fact, the Court held the statutory proof to be complete, one judge remarking,—"Shall we not believe what the heir himself believes?" (*w*)

§ 422. As the statute is not founded on a presumption of payment, the creditor does not require to refer to his debtor's oath whether the debt is resting-owing (*x*); and any statement on that point is extrinsic to the reference (*y*).

§ 423. It is not *pars judicis* to enforce this statute. The prescription is a privilege of the defender, and must be pleaded; and, therefore, if he joins issue on a proof *prout de jure*, he will be bound by the result (*z*).

(*s*) E. Leven *v.* Arnot, 1715, M., 10,991—Dalziel *v.* L. Lindores, 1784, M., 10,994—Graham *v.* Cochrane, 1725, M., 10,992—Ivory's Ersk., p. 771, note—1 Bell's Com., 330, correcting Ersk., 3, 7, 26. (*t*) Act quoted *supra*, § 412.

(*u*) Dalziel *v.* L. Lindores, 1784, M., 10,994, Hailes, 984, S.C.—Graham *v.* Cochrane, 1725, M., 10,992—Brown *v.* Crawford, 1741, M., 9417—*Contra* Mackenzie's Observ., Works, vol. i, p. 442.[2] (*v*) Brown *v.* Crawford, *supra* (Kilkerran's Rep.), M., 9418. (*w*) Dalziel *v.* L. Lindores, as reported by Hailes, *supra*. See also Graham *v.* Cochrane, *supra*. (*x*) Muir *v.* Cunningham, 1695, 4 B. Sup., 269—E. Leven *v.* Arnot, 1715, M., 10,991. (*y*) Ersk., 4, 2, 11—Kinloch *v.* L. Conservator, 1625, M., 13,231—Grant *v.* Anderson, 1705, M., 13,235. (*z*) Wyse *v.* Wyse, 1847, 9 D., 1405—*Supra*, § 411.

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[2] Mowat *v.* Banks, 1856, 18 D., 1093, *supra*, § 414, note [1].

CHAPTER III.—OF THE SEXENNIAL PRESCRIPTION OF BILLS AND PROMISSORY NOTES.

§ 424. The prescription of bills and promissory notes was introduced by 12 Geo. III, c. 72, which enacts:—"Whereas the not limiting bills and promissory notes to a moderate endurance in that part of Great Britain called Scotland has been found by experience to be attended with great inconveniences, for remedy whereof be it enacted, by the authority foresaid, that no bill of exchange or inland bill or promissory note executed after the 15th day of May 1772 shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes became payable" (*a*).

"Provided always, that no notes commonly called bank notes or post bills, issued or to be issued by any bank or banking company, and which contain an obligation of payment to the bearer, and are circulated as money, shall be comprehended under the aforesaid limitation or prescription; and that it shall and may be lawful and competent, at any time after the expiration of the said six years, in either of the cases before mentioned (*b*), to prove the debts contained in the said bills and promissory notes, and that the same are resting and owing, by the oaths or writs of the debtor" (*c*).

"And it is hereby enacted and declared, that the years of the minority of the creditors in such notes or bills shall not be computed in the said six years" (*d*).

These enactments, which at first were only temporary, were made perpetual by the 33 Geo. III, c. 18, § 35.

I. *Scope and effect of this prescription.*

§ 425. Under the enactments thus quoted, a bill or promissory note loses its force and effect as a probative document of debt, if action or diligence is not raised upon it within the statutory period; but the creditor will nevertheless succeed in his claim, provided he prove the debt contained in the bill or note, and the subsistence of

(*a*) § 37. (*b*) These referred to § 37 quoted above, and § 38 as to bills dated before the Act came into operation. (*c*) § 39. (*d*) § 40.

that debt, by the writ or oath of the alleged debtor. "During the six years the bill proves itself; and the burden of disproving value or proving payment lies on the debtor, and is, of course, limited to the writ or oath of the holder. After the lapse of six years the burden of proving the 'debt contained in the bill,' and 'that it is resting-owing,' is laid upon the holder of the bill; and that, too, is limited to the writ or oath of his adversary" (*e*).

§ 426. Accordingly, a prescribed bill is not only ineffectual as a sole ground of action, and incompetent as the foundation of summary diligence (*f*); but it cannot be used for any purpose which involves its subsistence as an obligatory document. A prescribed bill was therefore held not to be a sufficient voucher of a claim in a sequestration, so as to entitle the claimant to vote at the election of the trustee; and the circumstance that the claimant, as founding on the debt in the bill, had been the concurring creditor in the petition for sequestration, was held not to obviate the prescription which the other creditors were entitled to plead (*g*).[1] It has sometimes been thought that after the six years action could only be raised for the debt, and that a summons laid upon the bill was incompetent (*h*). But the recent practice admits summonses so libelled; because the statute allows the "debt contained in the bill" to be proved in a certain way, and therefore in suing for the debt the bill may be libelled on *descriptione* (*i*).

§ 427. The statute, however, only applies to actions laid upon bills as subsisting documents of debt. A claim of relief or recourse for the amount, on the ground that the pursuer retired the bill on behalf of the defender, does not come within the statutory rule; for it proceeds on the averment that the bill is extinguished, and therefore a reference to the debtor's oath as to its subsistence would be inept. This principle was applied to a claim by the acceptor of a bill against the drawer, on the ground that he had accepted and

(*e*) Per Lord Fullerton in Darnley *v.* Kirkwood, 1845, 7 D., 600. (*f*) Scott *v.* Brown, 1828, 7 S., 192. Here an adjudication on a prescribed bill was held inept. See this case *infra*, § 430 (*z*). So in Armstrong *v.* Johnstone, 1804, M., 11,140, diligence by arrestment on a prescribed bill was held to be inept, and its nullity not to have been removed by the subsequent oath of the debtor admitting the debt.

(*g*) Lockhart *v.* Mitchell, 1849, 11 D., 1341. See also Wink *v.* Mortimer, 1849, 11 D., 995.[1] (*h*) Stirling *v.* Lang, 1830, 8 S., 638—Bell's Pr., § 596.

(*i*) Christie *v.* Henderson, 1833, 11 S., 744—Napier on Prescriptions, 829—Shand's Prac., 213. See also Bell's Pr., *supra*.

[1] Nisbet and Romanes *v.* Nicoll, 1856, 18 D., 1042.

paid the bill on the drawer's behalf (*k*). And where a bill had been accepted by two parties in consideration of value to one of them, the sexennial prescription was held not to apply in an action of relief against him by the other acceptor, who had been obliged to retire it (*l*). The same principle will apply to a claim by the agent of a party to a bill (not being himself an obligant in it) for repayment of the amount, as having been advanced by him on behalf of his constituent (*m*). But where the drawer of a bill, being the acceptor's law agent, had discounted it with a bank, and retired it when due, taking a special receipt to that effect from the bank; in an action at the instance of his representatives against the acceptor after the lapse of six years, on the ground that he had paid the bill on the acceptor's behalf, the statutory rule was applied (*n*). Here, it will be observed, the action was at the instance of the proper creditor in the bill against the proper debtor, which position of the pursuer could not have been affected by the collateral transaction with the bank; and as the statute would have applied in an action by the bank against the acceptor, it must have been equally applicable to an action against him by the drawer, who had come into the shoes of the bank.

§ 428. The statute does not affect a bill when founded on to instruct a defence (*o*), *e.g.*, where one being sued to account for his intromissions takes credit for payments of bills granted by the pursuer either to himself (*p*) or to third parties (*r*). It has not been settled whether a bill founded on to instruct a plea of compensation comes under the statutory rule (*s*). It will probably be held to do so; because the equitable rule which allows a party to plead his counter claim without a separate action of constitution, should not exclude the other party from any pertinent plea either as to the existence or the proof of the counter claim.[2]

§ 429. If, however, a bill has been granted by way of constitution or collateral security for an obligation existing independently of it, the creditor suing for implement of that obligation is not affected by the circumstance that the bill has been prescribed; and

(*k*) Ralston *v.* Lamont, 1792, M., 1588; 11,130, S. C. (*l*) Jolly *v.* M'Neill, 1829, 7 S., 666. (*m*) See Hall *v.* Arnot, 1837, 16 S., 263. (*n*) Buchanan *v.* Macdonald, 1840, 2 D., 1444. The distinction between this case and Ralston *v.* Lamont, *supra*, is narrow. (*o*) Act quoted *supra*, § 424. (*p*) Thomson *v.* Balvaird, 1834, 13 S., 212. (*r*) Hall *v.* Arnot, 1837, 16 S., 263.

(*s*) The triennial and quinquennial prescriptions apply to debts pleaded in compensation. See *infra*.

[2] This seems assumed in the case of Ross *v.* Robertson, 1855, 17 D., 1144.

therefore he is not shut up to proving his claim by his debtor's writ or oath (*t*).[3]

§ 430. The statutory limitation does not apply if diligence has been raised or executed, or action commenced, on the bill within the six years (*u*). It was therefore held to be barred by a charge of horning (*x*), or a horning and caption (*y*) on the bill; but not by merely protesting it and registering the protest (*z*), or by a general charge upon it to enter heir to the original debtor (*a*). It is doubtful whether the limitation is excluded by a *meditatione fugae* warrant; which is a preliminary step to enable one to use diligence effectually, rather than actual diligence (*b*). An informal (*c*) or incompetent (*d*) action, or one before an incompetent court (*e*), or against a wrong party (*f*), raised during the six years, will not keep a bill in force. Nor will an action in which the defender was unable to appear from its having been raised in a foreign country at war with his own (*g*). But the circumstance of the defender having been an outlaw when the action was raised, will not prevent it from excluding prescription (*h*). An action which has been allowed to fall asleep will exclude (*i*); but it is more than doubtful whether one which has been abandoned will do so (*k*). An action in which the defender was assoilzied does not interrupt the long prescription (*l*). In a case of quinquennial prescription it was held to be no bar that the landlord had executed a sequestration in security of rent not yet due, and had allowed the tenant to sell the sequestrated effects; such sequestration being by way of security for the debt, and not diligence for payment of it (*m*).

(*t*) Hunter *v.* Thomson, 1843, 5 D., 1285—Sinclair *v.* Sinclair, 1823, 2 S., 600—Campbell *v.* Campbell, 1797, M., 1648. (*u*) 12 Geo. III, c. 72, § 37, *supra*, § 424—Roy *v.* Campbell, 1850, 12 D., 1028. (*x*) Henderson *v.* Stewart, 1830, 9 S., 180—Main *v.* Wilson, 1839, 1 D., 722 (here there was also a poinding)—Fraser *v.* Urquhart, 1831, 9 S., 728. (*y*) Thomson *v.* Easton, 1831, 9 S., 759.

(*z*) Scott *v.* Brown, 1828, 7 S., 192—Douglas, Heron, & Co. *v.* Richardson, 1784, M., 11,127—Armstrong *v.* Johnstone, 1804, M., 11,140. (*a*) Thomson *v.* E. Linlithgow, 1708, M., 4504. (*b*) See Boag *v.* Fisher, 1849, 11 D., 362.

(*c*) Gordon *v.* Bogle, 23d June 1784, F. C., and M., 11,127—Baillie *v.* Doig, 2d March 1790, F. C. (*d*) Cochrane *v.* Prentice, 1841, 4 D., 76. (*e*) M'Laren *v.* Buik, 1829, 7 S., 483—More, 269—*Contra*, Scott *v.* Bryden, 1706, M., 11,263.

(*f*) Reid *v.* Ker, 1789, Kilk., 414. (*g*) Don *v.* Lipmann, 1837, 2 Sh. and M'L., 682. The defender had not had intimation of the action. (*h*) Brodie *v.* Sheddan, 20th February 1821, F. C. (*i*) Denovan *v.* Cairns, 1845, 7 D., 378.

(*k*) Ib. (*l*) Montgomery *v.* Fowles, 1751, Bell's Folio Ca., 203.

(*m*) Cochrane *v.* Ferguson, 1830, 8 S., 324. The petition for sequestration in this case contained a prayer for decree of payment of the rent when exigible.

[3] Blake *v.* Turner, 1860, 23 D., 15.

§ 431. Equivalent to action or diligence is claiming upon the bill in a sequestration under the Bankrupt Act (*n*),[4] or in a ranking and sale, or other process of competition (*o*). But it was held that a bill is not kept in force by having been produced under a diligence against havers, in a process raised by the debtor's tutors for obtaining authority to sell his estate in order to pay off debt; the object of such a process not being to distribute the debtor's funds, but to satisfy the Court as to the expediency of a sale (*p*).

§ 432. The question has also been raised more than once whether extrajudicial proceedings, adopted by creditors for the purpose of making good their debts, can have the same effect as processes of competition, in preventing their claims from prescribing. In the first case on this point the Court found that it was not relevant to interrupt the sexennial prescription that the creditor had emitted an affidavit to the verity of his debt under a composition contract (*r*). The same point arose soon afterwards in regard to the triennial prescription; where a party having died insolvent, a meeting of his creditors was held, which was also attended by the factor *loco tutoris* for his children. It was there agreed that all the creditors should assign their debts to a trustee, who should take a general decree of constitution against the debtor's representatives. The claims of some of the creditors were prescribed at the date of the meeting, but as to others the statutory period expired in the interval between the meeting and the action of constitution. The

(*n*) By 2 and 3 Vict., c. 41, § 26, "the presenting of or concurring in a petition for sequestration, or the lodging a claim in terms of this Act in the hands of the interim-factor, sheriff-clerk acting as factor or trustee, or the sheriff officiating as preses at any meeting of creditors, shall interrupt prescription of the creditor's debt so petitioning, concurring, or claiming, and in regard to such debt bar the effect of any statute of limitations in England or Ireland, or Her Majesty's dominions, and although the sequestration shall be recalled, such interruption or bar shall notwithstanding be effectual." Mr Bell (3 Com., 144) observes, that as to the English statute of limitations, this only bars proceedings in Scotland. There was a similar but not so comprehensive provision in the former Sequestration Act, 54 Geo. III, c. 137, § 52. See Crawford *v.* Haig, 1827, 5 S., 705. The question has been raised, but not decided, whether lodging a claim under which the claimant did not wish to recover anything, would prevent prescription. The creditor had a lien over the debtor's title-deeds, which enabled him to recover from other parties; Dalgleish *v.* Christie, 1833, 11 S., 321. (*o*) Douglas, Heron, & Co. *v.* Richardson, 1784, M., 11,127—Nat. Bank *v.* Hope, 1837, 16 S., 177—Lindsay *v.* E. Buchan, 17th February 1854, 16 D., 600. (*p*) Ferrier *v.* E. Errol, 9th July 1811, F. C. (*r*) Watson *v.* Auchincloss, 1822, 1 S., 371 (new ed.).

[4] The corresponding section in the Act 19 and 20 Vict., c. 79, is the 109th. The provision is the same as in the Act 2 and 3 Vict.

Court held that while the former had prescribed, the latter had not. This decision did not proceed on the ground of personal exception against the representatives or against those creditors who by attendance at the meetings had concurred in the common *supersedere* of diligence; but it struck at the absent as well as the present creditors, and gave to the extrajudicial proceedings, which had been adopted in lieu of action or diligence, the same effect as would have flowed from formal process (*s*). Again, where the holder of a bill of exchange which was not prescribed acceded to a trust-deed for behoof of creditors, which with the deed of accession and subsequent infeftment narrated the debt; and where the debt was recognised in the minutes of the creditors, in the correspondence of the trustee, and in a deed of re-conveyance to the truster's heir; in an action at the instance of the creditor against the debtor's heir, it was held that the latter could not plead the sexennial prescription (*t*). The decision seems to have gone on the broad principle that a creditor who accedes to a trust-deed for behoof of creditors, takes a step equivalent to raising action on his claim (*u*). It could not have proceeded on the ground that the debt had been admitted by the other creditors within the six years; as that would not have excluded the statutory rule. Nor do the Court seem to have treated the deed of re-conveyance (which was dated after the prescriptive period) as a writ of the debtor admitting the debt. In another case a party had executed a trust-deed for behoof of his creditors, one of whom, holding an unprescribed bill granted by the debtor, intimated to the law agents of the trustees that he believed he had a claim on the estate, and asked what composition it was to yield; whereupon the agents replied that if he would transmit his claim they would communicate it to the trustees and let him know their answer. He did so, but took no farther steps till nine years afterwards. Having then revived his claim, the Court held that it had incurred prescription (*w*).

§ 433. There is evidently a conflict in these decisions. The result of them seems to be, that a bill or account (for the same principle applies to both) will not incur prescription where the creditor has claimed upon it in an extrajudicial competition of creditors; such claim coming within the spirit of the statutory provision re-

(*s*) Stuart *v.* Douglas, 1823, 2 S., 200 (new ed.). (*t*) Ettles *v.* Robertson, 1833, 11 S., 397. (*u*) In support of this view see also Watson *v.* Hunter, 1841, 3 D., 583, per Lord (Ordinary) Cockburn. (*w*) Ewing *v.* Cuming, 1885, 14 S., 1.

garding pursuit or diligence at his instance; but that an unfulfilled intention to make and insist in such a claim will not suffice (*x*).[5]

§ 434. Entering into a special submission for deciding on a claim saves it from prescription (*y*). But a general submission of all questions between the parties has been held not to have this effect (*z*). It does not appear from the report of the latter case whether the prescribed debt had been claimed upon during the prescriptive period. There seems to be no ground for distinguishing between such a claim in a general submission and a special submission as to the individual claim.

§ 435. It has been held, as to the quinquennial and triennial prescriptions, that founding judicially upon the debt as a defence on the ground of compensation or retention saves it from prescribing (*a*); whereas this does not arise from the mere concourse of

(*x*) With the cases in the preceding notes compare § 451, and relative cases.

(*y*) Vans *v.* Murray, 14th June 1816, F. C.—H. M. Advocate *v.* Hay, 1782, 2 Pat. App. Ca. 272. (*z*) Garden *v.* Rigg, 1748, Kilk., "Prescription," No. 11.

(*a*) M'Donald *v.* Jackson, 1826, 5 S., 28—Sloan *v.* Birtwistle, 1827, 5 S., 742.

[5] The ground of judgment particularly indicated by the Lord Ordinary Corehouse, in the case of Ettles, was that prescription could not run against the bill while the holder of it was, by accession to the trust, precluded from doing diligence on it. In the case of Blair *v.* Horn, 1858, 21 D., 45, Lord Justice-Clerk (Inglis) said, that in the case of Ettles the Court in effect held "that the trust and accession amounted to a reconstitution of the debt;" and Lord Wood, in the same case, expressed an opinion, that where a deed or other writing, within the years of prescription, is relied on as a reconstitution of a debt originally contained in a bill, the deed or writing should be libelled as the ground of action. In Blair *v.* Horn, the debtor, in 1840, had granted a trust-deed conveying to trustees certain heritable property, on the narrative that his creditors, and among them the Bank of Scotland (of which Blair was manager), had agreed to delay enforcing their claims, and to take payment by instalments at twelve and twenty-four months, and that, if he failed to pay the instalments, the trustees should have power to sell the subjects and pay the debts. The debts not having been paid, Blair, in 1856, raised an action against the trustees for the balance on four bills due in 1839 and 1840. In these circumstances the plea of prescription was sustained, it being held that the trust-deed precluded the creditor from doing diligence for twenty-four months only, since which time much more than six years had elapsed. In the case of Ettles, the amount of the debt was mentioned in the trust-deed; but not in the case of Blair. The law seems to be, that the plea of prescription will be overcome—(1) by such proceedings on the bill within the period of prescription as amount to action or diligence; (2) by writ after the lapse of the period of prescription; (3) by such reconstitution of the debt as will enable the creditor to dispense with the bill; and, perhaps, (4) by such a transaction as may be held to imply an agreement that action or diligence should not be necessary in order to keep up the debt.

debit and credit in compensation (*b*), or from retention (*c*), without these being pleaded judicially. The same rules apply to the sexennial prescription.[6]

§ 436. A judicial claim is required for preventing the statute from applying, although the debtor has been under sentence of forfeiture (*d*) or outlawry during the whole of the six years (*e*).

§ 437. In order to bar prescription, the action or diligence must be at the instance of the creditor or holder of the bill. Suspension by the debtor of a threatened charge on it has not this effect (*f*); nor has action and decree raised by the debtor in the bill against one bound to relieve him, that being *res inter alios acta* as regards the creditor (*g*). But diligence by one who is the holder of the bill at the time prevents prescription from running against a subsequent indorsee, although the indorsation is blank, and the diligence was not specially assigned (*h*).

§ 438. Action or diligence against one obligant bars prescription from running in favour of any other (*i*). Action raised against the acceptor prevents prescription from being pleadable by the drawer (*j*).

§ 439. When prescription has been excluded by action or diligence within the statutory period, the creditor's right is preserved entire, to be followed forth either by that or by any other appropriate procedure (*k*). Nor does a bill on which action or diligence has timeously followed again become subject to the operation of the statute at the expiry of six years from the date of the measure.

(*b*) Galloway *v.* Galloway, 1799, M., 11,122—Dickson *v.* M'Aulay, 1681, M., 11,090—Murray *v.* Thomson, 1665, M., 11,214—Maxwell *v.* Herries, 1712, M., 11,218. This holds also in the vicennial prescription; Walkinshaw *v.* Knapperny, 1737, Elch., "Prescription," No. 15. (*c*) Mason *v.* E. Aberdeen, 1709, M., 11,094—M'Adam *v.* Fogo, 1780, M., 6252, Hailes, 875, S. C.—Coupar *v.* Ogilvy, 1753, M., 11,107. But see Dallas *v.* M'Kenzie, 1695, 4 B. Sup., 271—Mitchell *v.* M'Adam, 1712, M., 11,096.

(*d*) Campbell *v.* Campbell, 1770, 2 Pat. App. Ca., 193. This was a case of long positive prescription. (*e*) Brodie *v.* Sheddan, 20th Feb. 1821, F. C. See § 430.

(*f*) 1 Bell's Com., 393. It was so held in a case of vicennial prescription; Wright *v.* Wright, 1717, M., 11,268. (*g*) V. Arbuthnot *v.* Douglas, 1795, M., 11,133.

(*h*) M'Lauchlan *v.* Thomson, 1831, 9 S., 753. (*i*) Gordon *v.* Bogle, 1784, M., 11,127 and 7532—M'Indoe *v.* Frame, 1824, 3 S., 295—Soutar's Reps. *v.* Soutar, 1827, 5 S., 876—Nat. Bank *v.* Hope, 1837, 16 S., 177—Paxton *v.* Foster, 1842, 4 D., 1515—Lindsay *v.* E. Buchan, 17th Feb. 1854, 16 D., 600. (*j*) Roy *v.* Campbell, 1850, 12 D., 1028. (*k*) M'Lauchlan *v.* Thomson, 1831, 9. S., 753—Fraser *v.* Urquhart, 1831, 9 S., 723—Lindsay *v.* E. Buchan, *supra*—See also Denovan *v.* Cairns, 1845, 7 D., 378.

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[6] Ross *v.* Robertson, 1855, 17 D., 1144; Lord Curri

But the effect of the action or diligence is to preserve the bill in force throughout the years of the long negative prescription (*l*).

§ 440. The six years commence at the time when the sum in the bill became exigible (*m*). Accordingly, when the bill is payable on demand, they begin to run from its date (*n*). But where days of grace are allowed, they commence from the last of these days, as payment cannot be exacted sooner. This is therefore the rule as to bills payable at so many days or months after date, or on a day specified (*o*). Bills payable at sight do not begin to prescribe until presentment. If the acceptance to such a bill is not dated, the term runs from the date of the bill, which is held to be the date also of the presentment (*p*). It is considered an open point whether days of grace are allowed when the acceptance to such bills is dated (*r*). They are admitted in bills payable a certain time after presentment (*s*).

§ 441. The years of minority of the creditors in the bill or note are not computed in the prescriptive term (*t*).

II. *Proving the Debt after the Bill has prescribed.*

§ 442. This prescription (as has already been observed) is founded on a two-fold presumption, 1st, that the bill did not create a debt originally; and, 2d, that if it did, the debt has been discharged. The statute therefore enacts that the pursuer must prove, 1st, that a debt was contained in the bill; and, 2d, that that debt is resting-owing: and it limits his mode of proof to the alleged debtor's writ or oath on reference (*u*). As already noticed,

(*l*) M'Indoe *v.* Frame, 1824, 3 S., 295—More, 273. See also Fraser *v.* Urquhart, 1831, 9 S., 723—M'Lauchlan *v.* Thomson, 1831, ib., 753—Ettles *v.* Robertson, 1831, 11 S., 397—Main *v.* Wilson, 1839, 1 D., 722—*contra*, Ferguson *v.* Bethune, 7th March 1811, F. C. (*m*) Act quoted *supra*, § 424. (*n*) Stephenson *v.* Stephenson's Tr., 1807, M., "Bills," Appx. No. 20—Cook *v.* M'Janet, note to ib.—1 Bell's Com., 393—Thomson, 628. (*o*) Douglas, Heron, & Co. *v.* Grant's Tr., 1793, M., 4602; affid., ib.; 6 Brown's Parl. Ca., 276, S. C.—1 Bell's Com., 393. In Allan *v.* Ormiston, 1817, Hume D., 477, this was held as to a bill payable one day after date.

(*p*) Kinloch *v.* Mercers, 1748, M., 477—Tarras *v.* Innes, 1740, M., 475, Elch., "Bill," No. 21, S. C.—Moffat *v.* Marshall, 1838, 16 S., 406—Thomson, 377, 589.

(*r*) 1 Bell's Com., 393, 411—Thomson, 628. (*s*) 1 Bell's Com., 411—Thomson, 628. The consequence of holding that bills payable at sight do not begin to prescribe till presentment may be to keep them alive during the long prescription. But although this seems inconsistent with the spirit, it is according to the terms of the statute 12 Geo. III, c. 72, § 37. Such bills therefore must be left to those inferences arising from *mora* on which (as already mentioned) the sexennial prescription has been founded.

(*t*) 12 Geo. III, c. 72, § 40; *supra*, § 424. (*u*) 12 Geo. III, c. 72, § 39, quoted *supra*, § 424.

effect is given to admissions on record as well as to those in the writ or oath (*w*). If the pursuer can prove the constitution of the debt by the defender's writ or admission on record, he is only bound to refer resting-owing to the defender's oath (*x*).

§ 443. I.—In order to prove the *constitution of the debt* it is not enough for the creditor merely to instruct by the debtor's writ or oath that the latter signed the bill. He must prove that the subscription was such as to create an obligation for the debt which the bill contains. Thus a defender was assoilzied who admitted his subscription, but stated that he got no value, and signed the bill in mistake for a receipt (*y*). And the same was held as to the qualified admissions that the defender signed the bill on a distinct understanding and agreement with the drawer (whose heirs sued on the bill), that it was not to constitute a debt against him, and that he would not be called on to pay (*z*);—and that the defender accepted the bill in order that the payee might with the proceeds retire another bill to which the acceptor was a party, but that the payee had not so applied them, that the deponent had to pay the first bill, and did not know what had become of it (*a*). So where a defender deponed that the sum which he received for the bill was in part payment of a previous bill by the pursuer to the defender's father, and that the bill sued on had been meant as a receipt

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(*w*) *Supra*, § 407. (*x*) Deans *v.* Steele, 1853, 16 D., 317—Wilson *v.* Strang, 1830, 8 S., 625. (*y*) Agnew *v.* M'Rae, 1782, M., 13,219. (*z*) Little's Tr. *v.* Baird, 1827, 5 S., 820. (*a*) Drummond *v.* Crighton, 1848, 10 D., 340—Lord Fullerton observed in this case, "the expression, the debt contained in the bill, cannot mean the obligation created by the mere fact of signing the document. That would be in substance rearing up the bill itself on the proof by the granter's oath that the signature was genuine; a construction at variance with the expressed object of the statute. The words, I think, must be held to mean the debt or the sum of money independently of the bill in liquidation or evidence of which the bill was granted." . . . "The admission that a party had signed a bill, and was willing to be bound for the amount contained in it when advanced, is no proof of the debt, unless it be also proved that the advance was actually made." The same view was thus illustrated by Lord Mackenzie, "I put the case that the statute had said that the matter might be proved by parole, and that a witness being called was asked if he delivered the bill to be discounted, and said that he did. But when asked whether he saw it discounted his answer was, 'No! No! I know nothing about that.' Would that be evidence that it was discounted? It would be a plain case of defective evidence." "Why then should we apply a different judgment? Does it follow that because a bill has been given to be discounted, it has in reality been so? I have said already what is the fact at this present time (during the monetary crisis of 1848), that for every bill offered to be discounted, a hundred are refused." See also on this case per Lord President M'Neil in Boyd *v.* Fraser, 1853, 15 D., 344.

for the amount, the Court (by a bare majority) assoilzied him; because his oath denied, instead of proving, that the bill had been granted in order to constitute a debt (*b*).

§ 444. Yet in order to prove the debt contained in the bill, it is not necessary that the defender should admit that value for it was paid to him. No doubt if the acceptor, when sued by the drawer, qualifies his admission of having signed the bill by stating that he did so without value, or for the drawer's accommodation, his oath disproves the alleged debt. But if the bill is in the hands of an onerous indorsee, such a qualification will not avail the acceptor, for his subscription was adhibited for the purpose of enabling his friend to raise money on the bill as a document of debt; and by subscribing it he undertook the obligations of an acceptor in all questions with third parties. Accordingly, where an acceptor stated this defence to an action at the instance of an onerous indorsee of the drawer, the Court decerned against him on the admission (*c*). So where one of two acceptors of a bill, when sued by the drawer's representative, admitted in his oath on reference that he had accepted, adding that he did so as cautioner for the other acceptor, the Court, in two separate cases, held that his oath proved the debt (*d*). In another case a similar decision was pronounced, the fact that payments had been made to the co-acceptor, for whose benefit the bill had been granted, being proved by markings in his handwriting on the bill (*e*). If, however, the defender, besides stating that he signed merely as cautioner for another person, depones that value was not given to that person, his oath will negative the alleged debt; just as the oath of an acceptor in the ordinary case, who denies that he received value, will not prove his liability (*f*). Yet where a party, one of the acceptors of a bill, being sued by the drawer's executors, deponed that he had signed

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(*b*) Fraser *v.* Fraser, 27th June 1809, F. C. (*c*) Philip *v.* Milne, 1800, M., "Bills," Appx. No. 9. (*d*) M'Neill *v.* Blair, 1825, 3 S., 459—Laidlaw *v.* Hamilton, 1826, 4 S., 636. Lord Pitmilly has well observed in the former of these cases—"The import of the oath is that value was given, not to Blair the deponent, but to Jeffrey, and that Blair on that consideration became bound for the debt. This is an onerous consideration so far as regards the creditors, who on the faith of it allowed Jeffrey to retain the money. It is of no consequence, as to the constitution of an obligation, whether value is received by a man himself or by his friend." This case was compromised on a threatened appeal; see per Lord Craigie in Laidlaw *v.* Hamilton.

(*e*) Wilson *v.* Strang, 1830, 8 S., 625. (*f*) Compare the cases in the four preceding notes with Christie *v.* Henderson, 1833, 11 S., 744, commented on by Lord Mackenzie in Drummond *v.* Crichton, 1848, 10 D., 840; and in Darnley *v.* Kirkwood, 7 D., 599; and *per curiam* in Boyd *v.* Fraser, *supra*.

the bill, that it was a renewal of a former bill to which he had been a party as cautioner for a co-acceptor, and that payment of that bill had not been claimed from him; and where he was not asked whether the other acceptor of the original bill had got value,—the Court held that his oath proved the debt in the second bill; because by means of it he had got the old bill to which he had been a party taken out of the way, and in this manner had got value for his acceptance (*g*).

§ 445. It has been held that the debt is not proved by the granter of the bill admitting his subscription, but stating that he was under sequestration at the time, that the object of the bill was to give an undue preference to a particular creditor, and that therefore the bill was struck at by the Bankrupt Act (*h*)—or admitting subscription, but stating that the bill was granted for an illegal purpose (*i*). In another case the Court held that it was extrinsic in an oath on reference to state that the bill had been granted for the price of smuggled goods, and that the defender held himself not liable, as he had been a loser by the transaction (*k*). But this decision may be questioned. A mere statement that the wine for which a bill had been granted had turned out useless, was held not to prevent the granter's admission from proving the debt (*l*).

§ 446. II.—Under the exceptional provision (§ 39) of the statute, the creditors in prescribed bills may, at any time after the expiry of the six years, prove the debts contained in the bills, "and that the same are *resting-owing* by the oaths or writs of the debtor." The last part of the provision (as already observed) is founded on the presumption that any debt which may originally have been contained in the bill was discharged before the six years expired; and it has raised that presumption into a strict statutory rule, that after the lapse of the prescriptive period, the creditor, in order to recover his debt, must prove not only its constitution, but also its subsistence, by his debtor's writ or oath on reference.

§ 447. Accordingly, the statutory requirement will not be met by the debtor's writ dated during the currency of the six years, although only a few days before their expiry; for the discharge may have taken place, and the statute assumes that it did take

(*g*) Boyd *v.* Fraser, 1853, 15 D., 342. (*h*) Clarkson's Tr. *v.* Gibson, 8th June 1820, F. C. (*i*) Campbell *v.* Scotland, 1778, M., 9530. (*k*) M'Neill *v.* M'Kissock, 28th February 1805, F. C. "The Court were of opinion that the quality resolved into a ground of challenge, which required to be supported by a proof."

(*l*) Robertson *v.* Clarkson, 1784, M., 13,244.

place, on some day before the whole six years elapsed (*m*).[7] Even a writ dated the last day of the statutory term, without counting the days of grace, where these are allowed, has been held insufficient (*n*). But the Court have given effect to a writ dated the last day of the prescriptive term (*o*). As such a writ is in a very high degree inconsistent with the idea of payment before the whole period expired; and as its object probably was to exclude the statutory rule by voluntary acknowledgment, granted while the bill could still be enforced; there is good ground, both in reason and equity, for giving effect to a writ so dated. Nor is this view excluded by the terms of the statute, which does not specify a date for the writ by which the subsistence of the debt may be proved (*p*).

§ 448. Whenever the debtor's writ, if dated after the prescriptive period, has shown that the debt was resting-owing at that date, the Court have sustained it as proof of resting-owing as at the date of the action; holding that it threw on the debtor the burden of proving payment (*r*). In general this is the proper view. It will be observed, however, that the statute requires proof that the debt *is* resting-owing, not that it was so at some date after the sexennial period had elapsed. In principle, therefore, it seems to lie with the Court to determine whether, looking to the character of the writ,

(*m*) Buchan *v.* Robertson Barclay, 1787, M., 11,128; Hailes, 1017, S. C.—Russell *v.* Farie, Bell's Oct. Ca., 125; M., 11,130, S. C.—Arbuthnot *v.* Douglas, 1795, M., 11,133—Horsburgh *v.* Bethune, 13th February 1811, F. C.—Ferguson *v.* Bethune, 7th March 1811, F. C. (*n*) Russell *v.* Farie, *supra*—Scott *v.* Gray, 1784, M., 11,126—Allan *v.* Ormiston, 1817, Hume D., 477—1 Bell's Com., 395—*Supra*, § 440.

(*o*) Lindsay *v.* Moffat, 19th May 1797, M., 11,137. The Court were unanimously of opinion that the prescription was barred by the debtor having subscribed a certain inventory the very day before the prescription had run; as that circumstance afforded most satisfactory evidence that the bill had not been paid within the six years. But the opinions of seven judges "attributed the same effect to an acknowledgment of resting-owing made at any time within the six years." "To give no effect to an acknowledgment of resting-owing within the six years, in any case where there is a possibility of the bill being paid before their completion, would be to introduce an indefinite and arbitrary course of prescription, unwarranted by the statute; the length of which would depend entirely on the time which was to run between the date of the acknowledgment and the expiration of the six years, and which might be only a year, a month, a week, or a day, according to circumstances." This view (from which other seven judges dissented) is altogether inconsistent with the statutory rule, as explained in the text, and construed in many decisions. (*p*) This view is supported by the authority of Professor Bell, Com., *ut supra*. (*r*) See *e.g.*, Wood *v.* Howden, 1843, 5 D., 507—Watson *v.* Hunter & Co., 1841, 3 D., 583—Stevenson *v.* Kyle, 1850, 12 D., 673—Macandrew *v.* Hunter, 1851, 13 D., 1111.

[7] M'Gregor *v.* M'Gregor, 1860, 22 D., 1264.

its date as compared with the dates of the bill and action respectively, and the whole attendant circumstances, the writ proves the debt to be still due, or (what is the same thing practically) whether it lays on the debtor the burden of proving payment or discharge. A memorandum which would be sufficient if granted shortly before the action was raised, might be inadequate if twenty years of silence and *mora* had intervened between its date and the date of the suit.

§ 449. It is not necessary that the debtor's writ should be either probative or holograph (*s*); and, if holograph, it will be effectual although it should not be signed (*t*). A writ which is brought home to the debtor will suffice, provided it can be shown by either intrinsic or extrinsic proof to apply to the bill in issue; an express reference thereto not being essential (*u*). If it can fairly be referred to the bill in issue, the burden of showing that it applies to some other bill falls upon the defender (*x*).[8]

§ 450. Payments of interest and partial payments of principal after the six years have expired, if proved under the hand of the debtor, will prove resting-owing (*y*). But payments within the statutory term are of no avail, as the debt may have been extinguished before the whole term expired (*z*). Yet a payment after the six years has been held sufficient, although it was for interest

(*s*) Macandrew *v.* Hunter, 1851, 13 D., 1111—Hyslop *v.* Howden, 1843, 5 D., 507—Black *v.* Shand's Crs., 1823, 2 S., 118. (*t*) Watson *v.* Hunter & Co., 1841, 3 D., 588—Hyslop *v.* Howden, *supra*, per L. Fullerton—Donaldson *v.* Murray, 1766, M., 11,110—1 Bell's Com., 333. (*u*) Watson *v.* Hunter, *supra*—Hyslop *v.* Howden, 1843, 5 D., 507—Bell's Com., *supra*. (*x*) Cases in preceding note.

(*y*) Soutar's Reps. *v.* Soutar, 1827, 5 S., 876—M'Tavish *v.* L. Saltoun, 1825, 3 S., 472—Black *v.* Shand's Crs., 1823, 2 S., 118—Scott *v.* Gray, 1784, M., 11,126.

(*z*) Horsburgh *v.* Bethune, 13th February 1811, F. C.—Black *v.* Shand's Crs., *supra* —1 Bell's Com., 333.

[8] Johnston *v.* Scott, 1860, 22 D., 393. It is sufficient if the writ admits a debt due under the bill or bills, and it is not essential that it should establish the precise balance due at its date. So where, after the years of prescription, a debtor, in answer to a demand for a balance on bills, wrote that the creditor's whole claim had been paid except £93; and that of that balance £50 had been paid by another obligant, the Court held that the writ instructed that at its date £43 was due, and directed argument and inquiry as to whether more was then due, and as to the amount due at the date of the action; M'Gregor *v.* M'Gregor, 1860, 22 D., 1264. But where a creditor in prescribed bills relied on letters written by the debtor after the period of prescription, admitting generally the existence of debts due on bills, the proof by writ was held insufficient; because the admissions could not be connected with the bills sued for; Blair *v.* Horn, 1859, 21 D., 1004.

running only to the end of that time (*a*). No payment of interest or principal, however, will avail, where it is only vouched by the creditor's writ or by markings in his hand upon the bill (*b*). In one case a receipt for interest, being in the handwriting of the creditor, but found in the debtor's repositories, was held to be equivalent to the debtor's writ, and to prove resting-owing (*c*). But with great deference to the authority of the very learned judges who decided that case, it is conceived that such a document is not the writ of the debtor proving the debt to subsist. *Quomodo constat* that it was not sent to the debtor *spe numerandae pecuniae*, or for the purpose of obtaining a written answer implying an admission of the debt; which answer the debtor refused? It can only be construed as the debtor's writ through the medium of an inference, which, however probable and relevant in a proof at large, is humbly thought not to accord with the strict terms of the statute. It may also be observed that the view which the Court took on this point was not essential to the decision of the case; as there was a holograph letter of the debtor sufficient to prove resting-owing.

§ 451. The debtor, however, will be bound by documents in the handwriting of a person having authority to bind him; because *qui facit per alium facit per se.* Accordingly, entries of payment of interest in his books, but in the handwriting of his book-keeper, were held sufficient (*d*); and markings of interest on the back of a bill, being in the handwriting of the debtor's agent or factor, received the same effect, on account of his having special authority to bind his constituents, who were a set of trustees (*e*). These cases stand contrasted with a previous decision (*f*), where markings by the debtor's factor, who had no such authority, were held insufficient (*g*).[9]

(*a*) M'Tavish *v.* L. Saltoun, 1825, 3 S., 472. (*b*) M'Indoe *v.* Frame, 1824. 3 S., 295—Ferguson *v.* Bethune, 7th March 1811, F.C.—Bell's Com., *supra.*

(*c*) Hyslop *v.* Howden, 1843, 5 D., 507. (*d*) Black *v.* Shand's Crs., 1828, 2 S., 118. (*e*) Campbell *v.* Ballantyne, 1839, 1 D., 1061. (*f*) Ferguson *v.* Bethune, 7th March 1811, F.C. (*g*) See on this subject the chapter on admissions by a factor or trustee.

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[9] Whether a party has authority to sign for another, so that his writ shall be the writ of the other, is a question depending on the circumstances and proof in each case. In general the writ of a factor or law agent is not the writ of his constituent; but if a party authorises another to act for him in reference to a particular piece of business, with his full powers, in such a case the writ of the agent will be held the writ of the party; M'Gregor *v.* M'Gregor, 1860, 22 D., 1264.

§ 452. When the creditor in a bill has obtained decre sence against the debtor, on an action raised *after* the si have elapsed, either the debtor or his other creditors may the decree; which, although proceeding as on confession equivalent to the debtor's writ or oath (*h*). Nor is such a when passing on a summons which contains a reference debtor's oath (according to an obsolete practice), effectua which has proceeded on the debtor's failure to appear and in a proper reference to oath (*i*). But a decree in absence after the six years will stand until set aside in proper f Where the granter of a prescribed bill presented a petitio questration signed by himself and by the creditor in the Court held that the resting-owing was not proved as aga other creditors by the debtor's subscription of the petition (*l* the circumstance of the creditor in a bill having attended a of the debtor's creditors after the six years had run, and name as a creditor having been entered in the minutes with jection, does not prove that his debt is resting-owing; for th tors are held not to be thereby barred from investigating th of their mutual claims (*m*). Such cases are essentially from those in which the proceedings, being adopted be prescriptive period has expired, are held to have kept th force (*n*).

§ 453. When the creditor, from not having proof by the writ, is constrained to refer to his oath, nice questions so arise as to whether the oath comes up to the statutory requ to prove resting-owing. On the one hand, the debtor shelter himself under a general denial of resting-owing; b specify the grounds on which his denial rests; and if the that the debt subsists, his general denial will not protect h decree (*o*). But, on the other hand, he will be assoilzied if pones to extinction of the debt in some habile mode, alth cannot specify the date or other details connected with it; an oath cannot be held to prove resting-owing.

(*h*) M'Nicol *v.* M'Neill, 1821, 1 S., 175—Buchan *v.* Robertson Barclay, 11,128—Nicolson *v.* M'Leod, 23d November 1810, F. C.—See also Black Crs., 1823, 2 S. (new ed.), 110; and see *infra*, § 460. (*i*) Nicolson *supra*. See on this the chapter on holding as confessed in reference to oath, (*k*) Black *v.* Shand's Crs., *supra*. (*l*) Lockhart *v.* Mitchell, 18 1341. (*m*) Stuart *v.* Douglas, 1823, 2 S., 200 (new ed.). (*n*) § 432 (*o*) 1 Bell's Com., 333—Tait, 238—A B, 1751, M., 12,475.

§ 454. Accordingly, where the defender stated distinctly that he had paid the bill several years before, but could not state the time or mode of payment, resting-owing was held not to be proved (*p*). And the Court took the same view of an oath that the deponent paid to a son of the original creditor, or to some one authorised by him, although he could not state distinctly to whom or at what time the payment had been made; there being ground for holding that the son had authority to receive payment, and the deposition being candid (*r*). It seems also that the defender will be assoilzied if he depones that he paid the debt to a third person by the creditor's order, although he does not depone that that person accounted to the creditor (*s*).

§ 455. But where the debtor deponed that while he was in India payment had been made by a relation in this country, and where he could not assign a satisfactory reason for his knowledge or belief of that fact, the Court held that the oath proved resting-owing (*t*). And the defender's general denial of resting-owing was disregarded where the only fact to which he deponed in support of it was, that he had been told by a co-acceptor that payment had been made by him (*x*). So where the defender, who was one of the partners of a dissolved company, deponed that he had not paid, and did not know that any other person had; that, at the dissolution of the company, one of the partners undertook to pay a composition on their debts, including the bill in question; but that he did not know that such payment had been made, and that no claim of relief had been made on him by the partner referred to; the Court held that the oath established the subsistence of the debt (*y*).

§ 456. When the defender depones to discharge not by simple payment, but by a transaction under a written contract, decree, or other document, and it depends on the terms of the writing whether the debt is extinguished, the Court will decide upon the construction of the writing, and will not take the defender's opinion of it;

(*p*) Fyfe *v.* Carfrae, 1841, 4 D., 152. (*r*) Roy *v.* Thomson, 1830, 8 S., 810.

(*s*) Moffat *v.* Moffat, 1737, Elch., "Qualified Oath," No. 4; M., 13,214, S. C.—Bett *v.* Hardie, 1759, M., 13,217—Clerk *v.* Dallas, 1711, M., 13,213. (*t*) Paul *v.* Alison, 1841, 3 D., 874. See Mette *v.* Dalziel, 1830, 8 S., 387. (*x*) Black *v.* Black, 1838, 16 S., 1221. See also per Lord Mackenzie in Darnley *v.* Kirkwood, 1845, 7 D., 599, commenting on Christie *v.* Henderson, 1833, 11 S., 744, *infra*. But see *contra*, Mackay *v.* Ure, 1849, 11 D., 982. (*y*) Stewart *v.* Stewart, 1823, 2 S., 558. See also Christie *v.* Henderson, *supra*, and as noticed by Lord Mackenzie in Drummond *v.* Crichton, 1848, 10 D., 340, and *per curiam* in Boyd *v.* Fraser, 1853, 15 D., 342.

[illegible] Accordingly, w[illegible] a compos[illegible] amounted [illegible] the Court w[illegible] of the [illegible] were involve[illegible] that the debt [illegible] made unde[illegible] whereby al[illegible] statement o[illegible] be taken from [illegible] establishing hi[illegible] by other comp[illegible]

§ 457. But the defender's oath will not prove resting-o[illegible] where he states that the debt was extinguished by a separate t[illegible] which does not depend on the construction of a wri[illegible] where he states that the pursuer accepted goods in satisfa[illegible] of the debt [illegible] agreed to discharge it, and promised to giv[illegible] or cancel the bill whenever he had an opportunity (*d*); or w[illegible] the defender depones that he paid a sum which had been fixe[illegible] tween him and the pursuer in a compromise of the claim (*e*).

§ 458. In all such cases, however, the Court will deter[illegible] whether the transaction as deponed to imports a discharge o[illegible] debt. This is well illustrated by cases of alleged compensa[illegible] If the debtor depones that the pursuer agreed that the debt [illegible] for should be held extinguished by the counter-claim, resting-o[illegible] is not proved; because it matters not what consideration ind[illegible] the creditor to discharge the debt in the bill if he really did so[illegible]

(*z*) This point is fully discussed in treating of the construction of oaths on refe[illegible]

(*a*) Brown *v.* M'Intyre, 1828, 6 S., 1022. See also Blair *v.* Balfour, 174[illegible] 13,217. (*b*) Stevenson *v.* Stevenson, 1838, 16 S., 1088, per Lord Or[illegible] Fullerton, whose judgment was acquiesced in by the parties, and approved of [illegible] Inner House. (*c*) See Johnston's Assignee, 1687, M., 13,241.

(*d*) Grant *v.* Grant's Crs., 1793, M., 13,221—L. Forrester *v.* L. Elphingstone, [illegible] M., 13,215, as explained in Elch., "Qualified Oaths," No. 6. (*e*) See [illegible] *v.* Graham, 1829, 1 De. and And., 218. (*f*) The view stated in the text [illegible] to be properly deducible from the following cases, as contrasted with those in th[illegible] next notes; Grant *v.* Grant's Crs., 1793, M., 13,221—Irvine *v.* Dickson, 1733, [illegible] "Qualified Oath," No. 1—Clark *v.* Dallas, 1711, M., 13,213—Maitland *v.* Baillie, [illegible] M., 13,212—Forbes *v.* Craigie's Crs., 1711, M., ib.; 12,464, S. C.—L. Forrester [illegible] Elphingstone, *supra*, (*d*)—Hepburn *v.* Hepburn, 1806, Hume D., 417—Johnston [illegible] signee, 1687, M., 13,241—Maxwell *v.* Herries, 1712, M., 11,218, *ad finem*—Lau[illegible] M'Gibbon, 1727, M., 13,206.

But where the defender's denial of resting-owing stands on a plea of simple compensation, the Court hold that the oath proves the subsistence of the original debt, and they require the debtor to prove his counter-claim (*g*). The reason is that compensation does not operate *ipso jure* as a discharge; but it is an equitable ground for resisting payment of a debt admitted or proved to be still undischarged; and the Court, not the debtor, has to decide whether the counter-claim is good.

The case, however, will not come within the former branch of this rule, if the defender states merely that it was his own understanding or intention that the debts should be mutually extinguished; for the pursuer's consent is essential to such a transaction (*h*). The subject of this and the preceding paragraphs is considered fully in treating of qualified oaths on reference. Some cases illustrative of the same doctrines will also be found in the sections on the triennial prescription.

III. *Admissions by Co-acceptors.*

§ 459. Each acceptor's admission is proof only against himself, and not against his co-acceptors (*i*). And where a bill bearing the signature of a company firm was referred to the oaths of the partners on the company being dissolved, the Court held that one of them who had deponed negative was entitled to absolvitor, and was not bound to await the result of the action as against the other, whose oath contained certain admissions (*k*).

§ 460. If each of the co-acceptors both admits the constitution of the debt and admits that he himself did not pay it, resting-owing is held to be proved as against them all (*l*). And in one case where

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(*g*) Simpson, 1728, M., 13,240—Johnston's Assignee, *supra*—Borthwick *v.* Ramsay, 1697, M., 4981—Sinclair *v.* Sinclair, 1703, M., 13,205—Fincham *v.* Muirhead, 1707, 4 B. Sup., 665—Minnie's Crs. *v.* Broomfield, 1736, Elch., "Qualified Oath," No. 3—Mitchell *v.* M'Kinlay, 1761, M., 13,241—Rankine *v.* Adair, 1799, M., 13,245—Stevenson *v.* Campbell, 1803, Hume D., 415—Millar *v.* Baird, 1819, ib., 480—Macdonald *v.* Crawford, 1834, 12 S., 533—See also Williamson *v.* Peacock, 11th December 1810, F. C.—Gilchrist *v.* Murray, 1675, M., 13,210. (*h*) Hunter *v.* L. Kinnaird's Tr., 1830, 9 S., 154. (*i*) Allan *v.* Ormiston, 1817, Hume D., 477—Houston *v.* Yuill, 1822, 1 S., 449—M'Neil *v.* Blair, 1823, 2 S., 174—M'Indoe *v.* Frame, 1824, 3 S., 295.

(*k*) Easton *v.* Johnston, 1831, 9 S., 440. (*l*) Laidlaw *v.* Hamilton, 1826, 4 S., 636—Wilson *v.* Strang, 1830, 8 S., 625. In this way the oath of each acceptor goes to prove non-payment as against the others. But that would not prevent any of them from being assoilzied, if he deponed that he knew a co-acceptor had paid. The question

two out of four acceptors admitted respectively that they had paid, and could not say whether any of the other acceptors had Court, by a narrow majority, held resting-owing to be proved This decision, however, is humbly thought to be questionable, the proof of resting-owing was incomplete so long as there was evidence that none of the acceptors had paid. The statute, pro ing on the presumption of payment by some one or more o debtors, seems to require resting-owing to be proved by the wri oaths of them all; whereas the decision referred to implies tha cause payment by the absent acceptors is not proved, therefore payment must be presumed. Such an inference would be al in the case of one of a large number of acceptors admitting th had not paid; and it is thought that there is no room for a dis tion founded on the number of acceptors admitting non-pay by themselves, as compared with those regarding whose payı or the reverse, there is no proof. Where action is raised again the co-acceptors, and some of them allow decree in absence t out against them, it is held that the others resisting decre liable, if they admit that they did not pay, and do not depone any other person did (*n*). In such a case the fact of non-pay by the absent acceptors is held to be sufficiently established by non-resistance, joined with the want of any contradictory state by the parties appearing.

IV. *Admissions by the Debtor's Representative.*

§ 461. If the heir of the debtor is sued for payment after scription has run on the bill, he is entitled in terms of the st to maintain that the creditor shall not succeed, unless he prov constitution and subsistence of the debt by the original de writ or by the heir's writ or oath. With regard to his oath the is in a much more favourable position than the original debtor while the latter, if he admits that the debt was incurred, must relevant grounds for maintaining that it is not resting-owing heir (who very often knows nothing about his predecessor's d

would then remain, whether the oath of one acceptor deponing that another ha would free them all. See per L. Gillies in Christie *v.* Henderson, *infra.*

(*m*) Christie *v.* Henderson, 1833, 11 S., 744. See this case commented on in ley *v.* Kirkwood, 1845, 7 D., 599—Drummond *v.* Crichton, 1848, 10 D., 340—B Fraser, 1853, 15 D., 342. Compare also Black *v.* Black, 1838, 16 S., 1220; *s* 455, (*x*). (*n*) Boyd *v.* Fraser, *supra*—M'Neil *v.* Blair, 1825, 3 S., 459.

is not required to make any positive allegation of payment or discharge; and the creditor will fail, unless the heir's oath imports a distinct admission of resting-owing. Accordingly, where the heir of the acceptor of a bill, being sued after the prescriptive period, admitted his ancestor's acceptance, but could not state whether the ancestor had paid the debt or not, the Court held that resting-owing was not proved (*o*). And where the representative of an acceptor who had died within the years of prescription had before their expiry made a payment to account of the bill; and where, being sued for the balance after the prescriptive period had expired, he denied all knowledge of the bill and of the debt for which it had been granted, but admitted the payment to account, of which he gave no satisfactory explanation; the Court sustained the plea of prescription, and held that resting-owing had to be proved by the heir's oath (*p*). So the heir of an acceptor was assoilzied, where he deponed that he was not aware of the existence of the bill till after the lapse of the prescriptive period (*q*).

§ 462. If the heir, not speaking from personal knowledge, merely admits that his opinion or inference from the circumstances is that the debt was constituted and is unpaid, the Court will not hold these facts to be proved (*r*). But if he swears that he has no doubt upon the point, they will probably sustain the pursuer's claim, since the defender, on a formal appeal to his conscience, could not deny its justice (*s*).

§ 463. Prescription is held to be overcome by payments of interest (*t*), or payments to account of the principal (*u*) of the bill, if made by the heir beyond the six years, and proved by his writ (*x*). Nor will he escape from this consequence by merely stating that he made the payment under a mistaken impression of his liability (*y*); although that will, of course, be a relevant circumstance in a proof by him that the principal debt had been paid.

The competency and effect of admissions by tutors, trustees, and other administrators, and of reference to their oaths, are considered in treating of admissions and oaths on reference.

(*o*) Stirling *v.* Henderson, 11th March 1817, F. C. (*p*) Darnley *v.* Kirkwood, 1845, 7 D., 595. See also Frank *v.* Forster, 1842, 4 D., 1515.

(*q*) Houston *v.* Yuill, 1825, 4 S., 24. (*r*) See Brown *v.* Crawford, 1741, M., 9418, Kilkerran's report. (*s*) See Dalziel *v.* Lindores, 1748, M., 10,994; Hailes, 984, S. C. (*t*) M'Tavish *v.* Lady Saltoun, 1825. 3 S., 472.

(*u*) Scott *v.* Gray, 1784, M., 11,126. (*x*) *Supra*, § 450. (*y*) M'Tavish *v.* Lady Saltoun, *supra*—Scott *v.* Gray, *supra*.

CHAPTER IV.—OF THE QUINQUENNIAL PRESCRIPTION OF MIN STIPENDS, AND VERBAL BARGAINS CONCERNING MOVEABLE

§ 464. The Act 1669, c. 9, enacts, "that ministers' stiper multures, not pursued for within five years after the same a and likeways mails and duties of tenants not being pursued five years after the tenant shall remove from the lands fo the mails and duties are craved, shall prescribe in all time c except the saids ministers' stipends, multures, mails and shall be offered to be proven to be due and resting-owing, defenders their oaths, or by a special writ under their ha knowledging what is resting-owing: And that all bargains c ing moveables or sums of money, probable by witnesses, sha be probable by writ or oath of party, if the same be not purs within five years after the making of the bargain."

I. *Scope and Effect of this Prescription.*

§ 465. The prescriptions which this statute introduced a logous to the sexennial and triennial prescriptions. The A with two different groups of cases, viz., 1st, ministers' st multures, and mails and duties, the first of which alway upon writing, the others being often, but not always, so tuted:—and 2d, verbal bargains concerning moveables or money. It makes the preservation of the ordinary mode o of these several claims conditional on the creditor raising his within five years; and in the event of his failing to do so, i his proof to the debtor's writ or oath, and fixes on him the of proving the subsistence, as well as the constitution, of t gation.

§ 466. The Act applies to "*stipends*," although the cha vacant during the time for which they were payable (*a*). held not to affect teind duties in the hands of the titular (*b*) right of a patron who had paid ann to the minister's represen and expended vacant stipend on pious objects, to recover fr other heritors their proportions of such payments (*c*).

(*a*) Gloug *v.* Macintosh, 1753, M., 11,063; Elch., "Stipend," No. 8, S. C 3, 7, 20. (*b*) Hamilton *v.* Herries, 1683, M., 11,061. (*c*) G Pate, 1799, M., 11,063. The payments had been made by the tutor of the pa was insane; and the action of relief was at the instance of the patron's repre

§ 467. "*Mails and duties*" prescribe whether the lease is written or verbal (*d*), and whether it is of a rural or an urban tenement (*e*). The rule applies where the whole of an estate is let on lease (*f*); but not where the mails and duties of a property are farmed out; as the Act only contemplates rents payable by tenants in the natural possession (*g*). One who had not possessed under lease from the proprietor, but by intrusion under a pretended right, is not entitled to the benefit of the Act (*h*). And where a fiar, holding a lease from the liferenter, had after the lessor's death entered into possession as proprietor, the Court refused to apply the statutory rule in an action against him for arrears raised more than five years after the lease had expired (*i*). It was pleaded that he had not removed from the land; but the chief *ratio decidendi* was, that he was not truly a tenant in the sense of the Act. Where the partners of a company for manufacturing paper were lessees of a certain paper mill, and one of them procured an assignation from the others of their interests in the lease, machinery, and trading stock, on his obligation to relieve them of the rent, and to pay them certain shares of the profits; in an action by one of these partners against the heir of the assignee for arrears of the pursuer's share of profits, the Court held that they fell under the quinquennial prescription (*k*). But the decision may be questioned.

§ 468. This prescription does not affect arrears due by tenants continuing in possession; because its currency only commences from the tenant's removal (*l*). It was held not to apply where a tenant remaining in possession was sued by a former proprietor for arrears due five years before the estate had been sold (*m*). It holds, however, where the tenant "ran away out of the country," as well as when he removed in the ordinary way (*n*).

The statute may be pleaded by the tenant's cautioner (*o*).

§ 469. The prescription of "*all bargains concerning moveables or sums of money proveable by witnesses*" has evidently been de-

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The plea of prescription was resisted on the ground of the patron's insanity; but the *ratio decidendi* was, that the tutor in making the payments in question was to be considered as *negotiorum gestor* for the heritors. (*d*) Nisbet *v.* Baikie, 1729, M., 11,059—Lyle *v.* Crichton, 1694, 4 B. Sup., 153. (*e*) Boyes *v.* Henderson, 1823, 2 S., 190. The subject here was a brewery. (*f*) Fairholm *v.* Livingston, 1725, M., 11,058. On this point correct Ersk., 3, 7, 28, by Ivory's Note, 365, to ib.

(*g*) Nisbet *v.* Baikie, *supra*—Bankt., 2, 12, 29. (*h*) Robertson *v.* Macintosh, 1688, M., 11,053. (*i*) Murray *v.* Trotter, 1709, M., 11,054. (*k*) Daes *v.* Scougall, 1710, M., 11,056. (*l*) Act quoted *supra*, § 464. (*m*) Strahorn *v.* Cunningham, 1739, M., 11,059. (*n*) Macintosh *v.* Baillie, 1753, Elch. Notes, "Prescription," No. 35. (*o*) Duff *v* Innes, 1771, M., 11,059.

signed to cover those independent mercantile transactions
moveables, which, from not being parts of current accou
not protected by the triennial prescription. It includes, for
a verbal contract of sale of a cow (*p*), or a lot of sheep (
bal bargain to take the stocking on a farm at a valuatio
a verbal bargain to deliver grain (*t*); in fact, "all sales,
and other consensual contracts concerning moveables, to
stitution of which writing is not necessary" (*u*). But it
embrace a claim for the value of goods unwarrantably c
without an agreement (*x*); or a claim for the balance of
of goods which had been consigned with the defender in
of money advanced (*y*); or an action of accounting by a
against a commission-agent to whom he had consigned
And a verbal bargain made at the commencement of a
years' lease, regarding the mode of disposing of the dung
mination, was held not to come under the statute, as no
could have been made on the contract till long after the
the five years (*a*). Again, where on the death of a
March 1827, his son succeeded to the lease and his daugh
the moveables; and where the seed for crop 1827 was
from crop 1826 which belonged to the daughters, and t
labour for 1827 was performed by their horses; and wher
1827 the son took the stock from his sisters under a writt
ment and valuation, in which nothing was said about the
seed and labour; and where the son having died in 1842,
was sequestrated in 1848, without the sum in the written
having been paid; the Court held that a claim by the
for the value of the seed and labour did not fall under the
rule (*b*).

§ 470. The statute was evidently not meant to app
gains which are constituted by writing, and it has the
ceived that interpretation (*c*). But where the pursuer of
for the price of grain alleged to have been furnished more

(*p*) Nobles *v.* Armstrong, 11th June 1813, F. C. (*r*) Ewart *v.* M
M., 11,067—Moffat *v.* Moffat, 1737, M., 13,214. (*s*) Lawson *v.* M
D., 603. (*t*) Whyte *v.* Spence, 1653, M., 11,065—Southesk *v.* Red
11,066; 12,326. (*u*) Ersk., 3, 7, 20. (*x*) Baillie *v.* Young,
472. (*y*) Macfarlane *v.* Brown, 1827, 5 S., 205. (*z*)
Mackinlay, 1851, 14 D., 162. (*a*) Wilson *v.* Swan, 1805, Hume
(*b*) Gairs *v.* Taylor, 1849, 11 D., 1244. (*c*) Southesk *v.* Red
11,066; 12,326, S. C.—Hunter *v.* Thomson, 1843, 5 D., 1285. See al
Spence, 1683, M., 11,065—Cameron *v.* Cameron, 1801, Hume D., 472.

s before, founded on a written contract between him and the nder for a sale of the grain at a certain price, and offered to e by witnesses that the grain had been delivered, the Court re-ed him to prove delivery (being the essential condition of the gation) by the defender's writ or oath (*d*).

§ 471. It is a condition of these prescriptions that the debt has been "pursued" within the five years (*e*). A petition for se-tration of rent past due will save it from prescribing (*f*); but estration raised *currente termino*, in order to secure rent not exigible, will not have this effect (*g*). Where before the expiry e five years the landlord stated his claim for arrears as a set-off nst a claim by the tenant, the Court held that he had thereby uded the prescription, as if he had raised action to recover pay-t (*h*). But where a landlord in defence to an action by his nt pleaded compensation upon rent which had been due for five s, the Court applied the statutory rule, because compensation not operate until it is pleaded (*i*).

§ 472. The prescriptions introduced by this statute do not run nst minors during their minority (*k*).

II. *Proving the Debt after it has incurred Prescription.*

§ 473. After the ministers' stipends, multures, and mails and es have prescribed, the creditor must prove that they are rest-owing by his debtor's writ or oath on reference (*l*). And the ciple holds here as well as in the sexennial prescription, that defender is not obliged expressly to depone that he paid. As pursuer must prove resting-owing, the defender's general denial hat fact will protect him, provided it is founded on statements ch import non-subsistence (*m*). Accordingly, where a tenant, l for prescribed rents, deponed that there had been two roups of

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d) Southesk *v.* Reddy, *supra.* (*e*) Act quoted *supra*, § 464. As to the ing of the term "pursued" see *supra*, § 430, *et seq.*, and *infra*, § 498.

f) Hogg *v.* Low, 1826, 4 S., 702. (*g*) Cochrane *v.* Ferguson, 1830, 8 S., The petition for sequestration prayed for decree of payment when the rent should ne due. (*h*) Macdonald *v.* Jackson, 1826, 5 S., 28—Nicolson *v.* Macalister's 1832, 10 S., 759. See also Sloane *v.* Birtwistle, 1827, 5 S., 742.

i) Mackintosh *v.* Baillie, 1753, Elch., "Prescription," No. 35—Maxwell *v.* Herries, , M., 11,218; 2677, S. C.—Dickson *v.* Macauley, 1681, M., 11,090.

k) 1669, c. 9, *ad finem.* (*l*) Act quoted *supra*, § 464. (*m*) *Supra*, 3, *et seq.*

his crop and stocking, which had been attended by a person half of the landlord, and with the proceeds of which he und that the rent had been paid, resting-owing was held no proved (*n*). In this case, also, the Court refused to hold th cipal tenant liable for admissions made on oath by his cautio

§ 474. Payment of interest, if made after the prescript run, and if instructed by the defender's writ, will prove owing (*p*). But payments of interest, and *multo majus* part ments of the arrears, if made within the five years, do not the requirement of the statute (*r*). Nor will any payment h effect unless it is admitted on record, or is proved by the wri debtor or some one authorised to bind him (*s*).

§ 475. There is a considerable distinction in the terms Act as to proving the debts referred to in the preceding para and proving verbal bargains, after the five years have run; f the former must be proved by the defender's writ or oath to ing-owing, the enactment as to the latter is, that they shall proveable by writ or oath of party, if they be not pursued f in the statutory period. The Court, however, have constru provision to mean that when a verbal bargain is not sued u after it has incurred prescription, the pursuer must refer to fender's oath its subsistence as well as its constitution (*t*). to be an open question, whether the pursuer, having written the bargain, is bound to prove by the debtor's writ or oath obligation therein is subsisting (*u*). Had it not been for cisions as to what the oath must embrace, there would ha little difficulty in holding that the defender's writ proving the constitution of the bargain is sufficient. But from th "writ or oath" of party occurring in the same connection, questionable to apply different rules as to the facts which th respectively prove (*x*). In this view it is still doubtful

(*n*) Cochrane *v.* Ferguson, 1831, 9 S., 501. See also Heddle *v.* Baikie, 1 1254. (*o*) The cautioner was freed under the septennial limitatio

(*p*) See *supra*, § 450. (*r*) Nisbet *v.* Baikie, 1729, M., 11,059—*su*

(*s*) *Supra*, § 450, *et seq.* (*t*) Campbell *v.* Grierson, 1848, 10 D., 361— Spence, 1683, M., 11,065—Nobles *v.* Armstrong, 11th June 1813, F. C.

(*u*) See per L. Justice-Clerk in Campbell *v.* Grierson, *supra.*

(*x*) It will be observed that the term "writ" of party as used in the t meant to include proper written constitution of the contract. Bargains w been reduced to writing are not "proveable by witnesses," and, as already ob not come within the statutory rule. The Act, however, seems to provide for t a verbal bargain being proved by the party's writings *ex post facto;* and the q whether after the five years these must prove not only its constitution, but al sistence.

statutory proof is completed by the defender's writ admitting bargain, but dated before the five years expired.

HAPTER V.—OF THE TRIENNIAL PRESCRIPTION OF MERCHANT'S ACCOUNTS, &C.

§ 476. This is the oldest, and probably the most important, of shorter prescriptions of Scotch law. It was introduced by the 1579, c. 83; which statuted and ordained "that all actions of t for house mails, men's ordinars, servants' fees, merchants' ipts, and other the like debts, that are not founded upon written gations, be pursued within three years, otherwise the creditor ll have no action, except he either prove by writ or by oath of party." These few words, which compose the whole of this rt and pithy statute, have given rise to many, and not very uni-n, decisions.

I. *Scope and Effect of this Prescription.*

§ 477. In its principle and effect this prescription is similar to quinquennial and sexennial prescriptions, of which it was the runner. It is designed for preventing debts which are usually led within a short time after they are incurred, from being intained and proved by loose and untrustworthy evidence, when means of either contradicting such proof of their constitution, of proving their discharge, may have been lost through lapse of e. With this object the statute limits the competency of a of *prout de jure* to cases where action is raised within three rs after the debt has been incurred; and if action is not raised after that period, it requires the creditor to prove his case by debtor's writ or oath. This prescription therefore does not pro-d on any presumption of relinquishment; for the debt may be ved by the statutory evidence any time within the years of the g negative prescription. It is founded on reasons of public po-, proceeding on the presumption that, if the debts which it spe-es have not been sued for within three years, they have either been incurred, or have been discharged; and it determines by

a peremptory rule the only kind of evidence by which the contr
may be proved.

§ 478. The Act has been liberally interpreted in regard to
debts to which it applies. This has necessarily arisen from
containing not only a pretty wide enumeration, but adding "
like debts," thereby leaving to the Court to extend its applica
to analogous cases. The want of precision in this expression
occasioned some conflict in the decisions, in consequence of diffe
judges being differently impressed as to the degree of simila
between certain debts and those enumerated in the statute (*a*).[1]

§ 479. "*House mails*" comprehend only the rents of subj
properly urban. Arrears of rents of a farm (*b*), or of a minis
glebe land (*c*), are not included under the term "the like del
Where the lease embraces both a house and land, the ques
whether it comes under the statutory rule will depend on whe
the house is accessory to the land, as in ordinary farms; or whe
the land is accessory to the house, as in country villas.

Each term's rent prescribes from the time when it falls due,
without regard to whether the tenant continues in possessio
removes (*d*).

§ 480. "*Men's ordinars*" mean entertainment furnished b
tavern-keeper, or in a boarding-house (*e*). And "the like del
include arrears of aliment due under a contract (*f*).[2] But cla
made by the mother of a bastard child against the father for arr
of its aliment are not included; because the act only contempl
claims founded on contract, whereas the father's debt arises ou
natural obligation, and the mother's claim is for relief of sums wh

(*a*) See per Lords Fullerton and Mackenzie in Blackadder *v.* Milne, 1851, 1
820, and, *per eosd.*, in M'Kay *v.* Carmichael, 1851, 14 D., 207. (*b*) R
Fleming, 1627, M., 12, 735. (*c*) Minister of Kilbucko, 1628, M., 11,083
(*d*) Cuming's Tr. *v.* Simpson, 1825, 3 S., 545—Ferguson *v.* Mair, 1737, M., 1
—Ersk., 3, 7, 17. (*e*) Forrest *v.* Carstair's Reps., 1715, M., 11,098; 97
C.—Thomson *v.* L. Duncan, 1808, Hume D., 466—Fraser *v.* M'Keitch, 1838, 1
1045—See also Balfour *v.* Landails, 1683, Harc., 216. (*f*) Hamilton *v.*
Ormiston, 1716, M., 11,100—Lady Carnsfield *v.* D. Gordon, February 1714, there
—and Cuming *v.* Andrew, 1722, ib.—*per curiam* in Thomson *v.* Westwood, 1842,
833—*contra*, Irving *v.* Maxwell, 1687, M., 11,092—Dick *v.* Gibson, there noted.[2]

[1] A claim for a statutory assessment, such as poor-rates, cannot be met by th
fence of the triennial prescription; Munro *v.* Graham, 1857, 20 D., 72.

[2] Taylor *v.* Allardyce, 1858, 20 D., 401.

dvanced on his behalf (*g*).[3] It seems also to have been held he Act does not embrace claims for payment of aliment fur- d to a minor, which are rather like advances by a *negotiorum* than entertainment furnished by an innkeeper under a con- (*h*). There is some doubt, however, as to what claims for nt fall under the statute (*i*).

481. When an alimentary debt is within the Act, each term's ent prescribes from the time when it became payable (*k*). where the two first items in a continuous account were for and lodging for a certain number of weeks at a specified rate, he rest was for furnishings (chiefly of provisions), the Court l not treat the entries for board as part of the account, but that they incurred prescription independently (*l*).

482. "*Servants' fees*" and "the like debts" comprehend not the wages of an ordinary servant (*m*), but also the yearly sum ole to an apprentice under his indenture (*n*), and the salaries her remuneration of persons employed in higher situations— a factor (*o*), a chamberlain and grieve (*p*), and one who ac- panied his employer in his travels abroad, kept his accounts, disbursed his money (*r*). And a claim for remuneration of ces rendered by the pursuer to the defender, on the footing of eing remunerated, falls under the statute, although an express act of service be not averred (*s*). But the Act was held not to de the arrears of salary due by heritors to their parochial

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) Thomson *v.* Westwood, 1842, 4 D., 833—Finlayson *v.* Gown, 7th July 1809, F. 'Dowall *v.* M'Lurg, 1807, M., "Prescription," No. 6—Butchart *v.* Ireland, 1839, 1128, per L. (Ordinary) Fullerton—Thom *v.* Jardine, 1836, 14 S., 1004, *per eund.* so Arbuthnot *v.* Symon, 1834, 12 S., 590—Paterson *v.* Cochrane, 1758, M., 11,080 *ra*, Forsyth *v.* Simpson, 1791, M., 11,081, Bell's Octavo Ca., 361.[3]

) Davidson *v.* Watson, 1740, Cr. and St., 288, reversing M., 11,077—per L. (Ordi- Fullerton in Thom *v.* Jardine, *supra*. But see opinions of judges in Thomson *v.* wood, *supra*—and *contra*, Galloway *v.* Galloway, 1799, M., 11,122.

See cases in preceding notes. (*k*) Ersk., 3, 7, 17—Forrest *v.* Carstair's 1715, M., 9713; 11,098, S. C. (*l*) Fraser *v.* M'Keitch, 1838, 16 S., (*m*) M'Dougall *v.* Campbell, 1833, 7 W. S., 19; affirming 8 S., 959.

) Crawford *v.* Simpson, 1731, M., 11,102. (*o*) Smith's Children *v.* E. n, 1714, M., 11,096; 4062, S. C. (*p* Ross *v.* Master of Saltoun, 1680, 1,089. (*r*) Robertson *v.* Marq. Annandale, 1740, Cr. and St, 293.

) Alcock *v.* Easson, 1842, 5 D., 356—Smellie *v.* Miller, 1835, 14 S., 12—Smellie chrane, 1835, 13 S., 544—Shepherd *v.* Meldrum, 1812, Hume D., 394.

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[3] Moncrieff *v.* Waugh, 1859, 21 D., 216.

schoolmaster (*t*), or arrears of pay when claimed by a soldi his officer, to whom the same was payable by government (

§ 483. When wages fall under the Act, each term's prescribes independently as it becomes due (*x*).

§ 484. "*Merchants' Compts*" mean primarily accounts to shopkeepers, or sellers of wares on credit (*y*). The term nection with the general phrase of "the like debts," emb counts to dealers whether wholesale or retail (*z*); to artifi furnish labour, not goods (*a*); and to surgeons and apotheca and, generally, all accounts for furnishings, labour, and which are apt to run into credit, and which, being contract out writing, are likely to be discharged without that form The statute was held to include a claim by a sub-contracto the principal contractor for the cost of work in excava foundations of a building, at a specified rate per yard, unde bal contract (*d*). Baron Hume reports a case where an a for superintending a contract to build houses was held not prescription (*e*). But this decision is more than question Accounts to printers (*g*), surveyors (*h*), and law-agents (under the general clause in the Act; and the same rule applied to an annual factor fee for managing the affairs of

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(*t*) Nicolson *v.* Monro, 1747, M., 11,080. The session papers show that was a *parochial* schoolmaster. (*u*) Graham *v.* E. Leven, 1709, M.,

(*x*) 1 Bell's Com., 331—Douglas *v.* D. of Argyll, 1736, M., 11,102—Ros of Saltoun, 1680, M., 11,089. (*y*) "A merchant in Scotch phrase or shopkeeper, like the French *marchand*, a person who sells articles usually to day on credit, but on short credit"; per L. Fullerton in M'Kinlay *v.* M'Ki 14 D., 164. (*z*) Ord *v.* Duffs, 1630, M., 11,083—Bruce *v.* Jack, 1670, 609—Russel *v.* E. Argyll, 1610, M., 11,082—Ersk., 3, 7, 17. (*a*) B M., 11,092—Tweedie *v.* Williamson, 1694, M., ib. (*b*) Ersk., 3, 7, 1 Com., 331—See Macdowall *v.* Loudon, 1849, 12 D., 170. (*c*) *supra*. Mr Bell observes, that as the payment of money cannot in Scotlan by parole, while the furnishing of goods may be so proved, the Act was int presumption, to protect persons dealing with retail merchants, and those i situation, from a second demand. As to the statute introducing a presu *supra*, § 405. (*d*) M'Kay *v.* Carmichael, 1851, 14 D., 207, and *su*

(*e*) Donaldson *v.* Ewing, 1819, Hume D., 481. (*f*) See per I in Blackadder *v.* Milne, 1851, 13 D., 820. (*g*) Neill & Co. *v.* Ho 12 D., 618. (*h*) Stevenson *v.* Kyle, 1850, 12 D., 673. (7, 17—1 Bell's Com., 331—Somerville *v.* Muirhead's Exs., 1675, M., 11,087 M'Kenzie, 1695, 4 B. Sup., 271—Campbell *v.* Stein, 23d Nov. 1813, F. C.; Dow, 116—Ker *v.* Mag. of Kirkwall, 1827, 5 S., 802—Wallace *v.* M'Kissock, 542—Napier *v.* Balfour, 1835, 13 S., 853—Moncrieff *v.* Durham, 1836, 1 M'Andrew *v.* Hunter, 1851, 13 D., 1111—Cullen *v.* Smeal, 1853, 15 D., 868.

d (*j*); to a claim for remuneration by a clerk to a submis-(*k*); and to a commission for cash advances, when forming of a law-agent's account (*l*).[4]

485. The statute, however, does not embrace all *mercantile* nts (*m*). It is held not to include a claim for the price under lated sale of goods (*n*);[5] and whether it applies to a number icles sold under one contract, but delivered at different times, ubtful (*o*). In a case already mentioned, where two daughters leceased farmer claimed in the sequestration of his son's estate alue of seed which had been supplied to the son from crops ging to them, and of labour performed by their horses; the ee's defence of prescription was repelled (*p*). Accounts for advances do not come within the Act (*r*). Consequently, a law-agent's account includes both cash advances and busi-charges, the prescription is held to run against the latter, and gainst the former (*s*). If, however, the cash payments are ly accessory to the business charges, and such as usually oc-n business accounts, the Court will not allow them to be picked rom among the items of professional charge, but will apply

) Grubb *v.* Porteous, 1836, 13 S., 603. (*k*) Farquharson *v.* H. M. Advo-2d July 1754, M., 11,108, inaccurately noticed by Ersk., 3, 7, 17.

Scott *v.* Gregory's Tr., 1832, 10 S., 375. (*m*) On the difference be-*merchants'* accounts and *mercantile* accounts, see per L. Fullerton in M'Kinlay *v.* lay, 1851, 14 D., 164, *supra* (*y*). (*n*) Baird *v.* Montgomery, 1688, M., —Ewart *v.* Murray, 1730, M., 11,067—M'Gregor *v.* Stewart, 1811, Hume D., Smith *v.* Miller, 1827, 5 S., 338. (*o*) In Bruce *v.* Jack, 1670, 1 B. Sup., e statute was held to apply to such a case. But in M'Dougall *v.* Campbell, 1833, 59; 7 W. S., 19, the Court of Session held that a claim for the price of cattle sold livered in this way, and forming part of an account which embraced cash advances her items, fell under the statute. Lord Chancellor Brougham considered the loubtful, and reserved it by deciding the case on other grounds.

) Gairs *v.* Taylor, 1849, 11 D., 1244, *supra*, § 469. (*r*) Smith *v.* Bell, 7 S., 771—Ker *v.* Mag. of Kirkwall, 1827, 5 S., 802—Paterson *v.* M'Kenzie, 1825, 20—Moncrieff *v.* Durham, 1836, 14 S., 830. (*s*) Moncrieff *v.* Durham, -Ker *v.* Mag. of Kirkwall, *supra*.

And to an account to an engraver for preparing parliamentary plans of a projected y; Johnston *v.* Scott, 1860, 22 D., 393.

Where prescription was pleaded in defence to a claim for the price of commodities were all furnished at one time, more than three and within five years prior to tion, the pursuer pleaded that the triennial prescription did not apply to an ac-for a single furnishing, but that the quinquennial prescription would have applied e five years elapsed. But Lord Kinloch repelled that plea, and held that the dis-n was in the character of the transaction, not the number of furnishings; and he ned the defence of the triennial prescription; Gobbi *v.* Lazzaroni, 1859, 21 D.,

the statute to the account as a whole (*t*).[6] So an account inc to a newspaper proprietor for advertising prescribes, althou advanced the government duty (*u*). The converse also of the principle would seem to hold; so that business charges, and th when occurring incidentally in an account which does no under the statute, and when mixed up with the other items o account, will not be held to have incurred prescription separatel

§ 486. The statute includes an account incurred to a sol in London employed to oppose a bill in Parliament (*y*). But a Scotch attorney in Exchequer had been deputed by the ge body of Scotch distillers to attend to their interests in reg certain legislative measures, under which employment he perfo several journeys to London, and was otherwise much occupi the business, the Court, in three cases, held that his claim fo muneration did not come within the statute, because the bus was of a special character, arising *ex mandato*, and not falling w the ordinary business of the pursuer as a Scotch legal pract er (*z*). The authority of these decisions was recognised in a s quent case, where a claim by an engineer, who had been emp as a skilled witness on a water company's bill, was considered majority of the whole Court not to fall within the triennial scription (*a*). It was not necessary, however, to decide the expressly, as the claim was "founded on a written obligation.

§ 487. The Act only strikes at accounts as between mer and customer, or employer and employee. It does not inclu counts between a commission-agent and his principal (*b*), c tween the general body of owners of a ship and one of them as their administrator had drawn the freights (*c*); or accoun

(*t*) See Napier *v.* Balfour, 1835, 13 S., 853. See also Hotson *v.* Threshie, 1 S., 482. (*u*) Robertson *v.* Royal Association, 1840, 2 D., 1343.

(*x*) So held in Boyes' Tr. *v.* Hamilton, 30th June 1829, as reported in F. C. De. and And., 245. But see this case in 7 S., 815. See also Paterson *v.* Walk Lords Bannatyne and Craigie), 19th June 1812, as noted in 13 D., 825.

(*y*) Webster *v.* M'Lellan, 1852, 14 D., 932—Deans *v.* Steele, 1853, 16 D., 31

(*z*) Paterson *v.* Walker, 13th November 1812—Walker *v.* Simpson, 9th Jun (both noted in Blackadder *v.* Milne, 1851, 13 D., 820, and in Walker *v.* M'Nair —Walker *v.* M'Nair, 1832, 10 S., 672; 5 De. and And., 390, S. C. (*a*) adder *v.* Milne, *supra*. (*b*) M'Kinlay *v.* M'Kinlay, 1851, 14 D., 162—*infr*

(*c*) Butchart *v.* Moodie, 1781, M., 11,113; Hailes, 885, S. C.

[6] The question whether a distinction can be taken between business charges b agent and advances made by him in the course of business, as regards the appl of the statute, has been raised in two recent cases—Lamond's Trustees *v.* Mer Richardson, Loch, & Maclaurin *v.* Belhaven—and is now under consideration Court on minutes of debate.

a party and an intromitter with his funds (*d*); or claims by y against one who had received his money as his agent, factor, signee (*e*); or claims by a mandatory or a *negotiorum gestor* payment of advances (*f*). Indeed no accounts arising out of ontracts of mandate, or *negotiorum gestio*, are considered to be g "the like debts" to accounts by a merchant against his cus-; and this is peculiarly the case in regard to accounts be- commission-agent and employer, which were hardly known otland at the time when the Act 1579, c. 83, was passed (*g*).

488. Where one of several debtors has paid a merchant's ac-, his claim for relief against a *correus* does not come under the ial prescription (*h*).

489. In two cases where prescription was held not to apply, ourt seem to have been partly influenced by the circumstance he accounts were between foreign merchants (*i*). But as they d to consignments of goods to commission-agents, they did not within the statutory rule. The circumstance of the parties to count being foreigners is now held not to prevent it from pre- ng (*k*).

490. With regard to the extent to which merchants' ac- s and the like debts are struck at by the statute, it seems to been held, in a claim by a farmer for the price of wool and e sold yearly to a merchant, that each year's sales prescribed endently of the others (*l*). But whether this special case was ed correctly or not, the general rule is completely established, the prescription of merchants' accounts does not run on the separately, but on the whole account when closed (*m*). And rrency of the account is preserved by a new article being fur- d within three years of the preceding item (*n*); unless the en-

Maxwell *v.* Welsh, 1633, M., 11,084.

Frier *v.* Paterson, 1826, 4 S., 396—Waddell *v.* Morton, 1825, ib., 170—M'Far- Brown, 1827, 5 S., 205—Hamilton & Co. *v.* Martin, 1795, M., 11,120—Anderson ild *v.* Wood, 1809, Hume D., 467. (*f*) Drummond *v.* Stewart, 1740, M., 11,103, S. C.—Saddler *v.* M'Lean, 1794, M., 11,119; Bell's Folio Ca., 104, S. C. b *v.* Porteous, 1835, 13 S., 603. (*g*) M'Kinlay *v.* M'Kinlay, *supra*— on & Co. *v.* Martin, *supra*. (*h*) Bland *v.* Short, 1824, 3 S., 419. See also on *v.* Westwood, 1842, 4 D., 833—*supra*, § 480, (*g*), and *supra*, § 427.

Hamilton & Co. *v.* Martin, *supra*—Anderson and Child *v.* Wood, *supra*.

See *infra*, § 526, *et seq.*, and per L. Cunninghame in M'Kinlay *v.* M'Kinlay, *supra*.

Tod *v.* Wightman, 1699, 4 B. Sup., 463. The report is not very clear.

1 Bell's Com., 331; Ersk., 3, 7, 17—Somerville *v.* Muirhead, 1687, M., 11,087— 385, Dirl. Dec., No. 318—White *v.* Currie, 1829, 8 S., 154. Here the rule in the s applied, although each year's furnishings were added up into a distinct sum in ditor's books, and interest was charged separately on each amount.

Mason *v.* E. Aberdeen, 1709, M., 11,094—1 Bell's Com., 332.

try was made as an afterthought to escape from prescription unless the new article was paid for separately, and so did no into the account (*p*). The currency of the account is preser the later items, if originally furnished on credit, although pa for them may have been recovered from a *correus* of the defen Where prescription was pleaded against the earlier items of count, and payment of later items had been recovered from *reus*, it was held competent to refer to these later items to the plea of prescription, although they had not been li on (*s*).

§ 491. A law-agent's account, divided into branches appl to the different matters in which he is employed, prescribe continuous account (*t*). And this holds as to a claim by an burgh agent against the country agent who employed hi though the account be divided into branches applicable several clients (*u*). But, in such a case, the Edinburgh claim against each of the clients individually seems not to b served from prescription by the branches which apply t others (*x*).

§ 492. An account is not held to be continuous, unless it due by the same debtor to the same creditor. It is therefo continued by an article furnished by the debtor to the credi place of the opposite (*y*). The account is also closed by the d death, and is not continued by furnishings to his widow (*z*) presentative (*a*). It is an open question whether an accou curred to an individual can be continued by one to a firm of he becomes a member, or *vice versa* (*b*). But where two ac were incurred to an agent individually with less than three between them, and in the interval the client incurred an a to a company of which the agent was a partner, the latter a

(*o*) Stewart *v.* Scott, 1844, 6 D., 889—Gordon *v.* Innes, 1826, 4 S., 577.

(*p*) Beck *v.* Learmonth, 1831, 10 S., 81. (*r*) Fisher *v.* Ure, 1836, 14

(*s*) Fisher *v.* Ure, *supra.* (*t*) Elder *v.* Hamilton, 1833, 11 S., 591-

v. Marshall, 1825, 3 S., 329 (new ed.). (*u*) Fisher *v.* Ure, *supra.*

(*x*) See Fisher *v.* Ure, *supra.* (*y*) Ramage *v.* Charteris, 1782, M., 1

(*z*) Wilson *v.* Tours, 1680, M., 11,089—Lyon *v.* Mitchell, 1819, Hume D., 4

(*a*) Kennedy *v.* Donald, 1741, M., 11,089; 5 B. Sup., 710, S. C.—Cock Hamilton, 1712, Rob. Ap., 32—L. Ormiston *v.* Hamilton, 1709, M., 11,093— Com., 332 (*contra*, Ersk., 3, 7, 17). This also holds as to a successor *titulo l* Elder *v.* Hamilton, 1833, 11 S., 591. (*b*) The account was held not to tinuous by L. (Ordinary) Cunninghame in Torrance *v.* Bryson, 1840, 3 D., quiesced in); but this is questioned by L. Medwyn in Stewart *v.* Scott, 1844, 6 And in Barker *v.* Kippen, 1841, 3 D., 965, the Court, in the special circumstanc it continuous, but waived determining the general point.

not to interrupt the continuity of the two others, so as to first one to prescribe independently (*c*).

It is a condition of this prescription that the debts to applies be "*not founded upon written obligations;*" the rea- ently being that, if a debt is constituted by writing, the nality will likely be observed in discharging it (*d*). This al rule has been applied to cases of rent under a written wages under a written contract of service (*f*), and the cost work under a written contract (*g*). And where the agent for ompany wrote a letter to an engineer stating that his pro- attendance would be required in London by the company ain time, and mentioning a certain rate of remuneration, e agent supposed would suffice, the Court held that the ook the case out of the statute (*h*). Again, in an action e price of sheep, where the bargain was proved by the aluation of a person to whom the parties had referred the an improbative missive, the Court held that the case did under either the triennial or the quinquennial prescrip-

But where goods were merely ordered in writing, an the price of them is held not to come within the statu- ption; because the "obligation," in so far as it stands on riting, is inchoate and incomplete (*k*). And on the same where one wrote to a young man, desiring him to come d his son at a certain fee, the Court sustained a plea of nial prescription in an action for the arrears (*l*). An op- cision was pronounced in an action for aliment of a pupil, e Court held to come within the exceptional clause of the s the pupil had been "recommended by a letter of his fa- the host (*m*).

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ance *v.* Bryson, *supra.* (*d*) On this see 1 Bell's Com., 332.
ings Tr. *v.* Simpson, 1825, 3 S., 545. (*f*) M'Tavish *v.* Campbell, Sup., 543. See Mackenzie *v.* T. of Burntisland, 1728, M., 11,102; 11,421, see *contra*, Crawford *v.* Simpson, 1731, M., 11,102. (*g*) Watson *v.* all, 1711, M., 11,095. See Hotson *v.* Threshie, 1833, 11 S., 482.
kadder *v.* Milne, 1851, 13 D., 820; noticed *supra*, § 486.
ron *v.* Cameron, 24th June 1801, Hume D., 472. (*k*) Cheap *v.* 775, M., 11,111—Ross *v.* Shaw, 1784, M., 11,115—Douglas *v.* Grierson, 1794, Bell's Folio Ca., 97, 102, S. C.—1 Bell's Com., 332. See also E. Southesk 1682, M., 11,066; 12,326, S. C.—*contra*, Dickson *v.* M'Auley, 1681, M., l *v.* ———, 1755, 5 B. Sup., 840. (*l*) Craigievar's Tutors *v.* Gray, 1,091. (*m*) Somervail *v.* Stratoune, 1649, 1 B. Sup., 402.

§ 495. Where an account for furnishings by the ke lodging and eating house, was sued upon as "per pass-b mencing 2d December 1833 and ending 9th Septemb signed by the defender; and where it appeared that the s if genuine, had been written before the entries, and that been filled in by another person continuously; the Court there was no writ constituting the debt, and that the pr applied (*n*). The case was decided on its special circu and without settling whether a properly subscribed acc *in re mercatoria* might be received as a written constituti debt, the genuineness of the subscription (if disputed) bei by parole.

Where a master mason sued road trustees for the pric executed during a number of years, partly on written esti partly on verbal orders, the whole being entered in a g count, in which there were entries of partial payments the value of the work done on estimate, the Court applied nial prescription to the account as a whole, and would the pursuer to pick out the items supported by writin ground that they fell under the exceptional clause of the s It does not appear very clearly whether the Court consid the written estimates would have excluded prescriptio point had arisen purely.

It were well if the characteristics of the "written o which the statute requires were defined by some authorita ment; for the decisions on the point present neither har definite principle.

§ 496. The currency of this prescription is not imped creditor's minority (*p*).

§ 497. The Act which introduced the triennial presc dained that all actions for the debts to which it refers "b within three years, otherwise the creditor shall have no cept he either prove by writ or oath of his party." The conflicting constructions of this enactment.

On the one hand, it is said that the Act peremptori that if the action in which the claim is made was not rai the three years expired, the proof shall be limited to the

(*n*) Campbell *v.* Grant, 1843, 5 D., 755. (*o*) Hotson *v.* Thres S., 482. (*p*) Brown *v.* Brodie, 1709, M., 11,150—1 Bell's Com.,

oath; and, therefore, the only points to be regarded are, 1st, er the debt falls within any of the statutory definitions? d, Whether the particular action in which prescription is l was raised before the three years had expired? This view orted by *obiter dicta* in several cases as appearing in the re- r).[6]

the other hand, it is maintained that if a proper action for ot was pursued within the three years, the prescription is ed; and the creditor may prove his claim *prout de jure* in osequent action, although raised after the statutory period pired. This view is favoured by several cases (*s*), and was ly found to be the true construction of the statute in a re- d highly authoritative decision (*t*). In that case the claim was for payment of an account) had within the three years dicially pleaded by way of recompensation in an action at tance of the creditor in the account against the debtor, and ong with other questions between them, been the subject of ial reference. The referee, however, died; and on an action debt being raised after the three years had expired (but t any undue delay on the part of the creditor), the debtor l the triennial prescription. Founding on the *dicta* above ned, he maintained that, as the action had been raised after piry of the three years, the only proof competent to the credi- the debtor's writ or oath. But the Court repelled that plea, ld that prescription had been excluded by the previous pro- gs. The grounds of decision were, 1st, That the debtor's ent to refer within the three years imported a waiver of the prescription, and barred him, *personali exceptione*, from that

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r Lords Glenlee and Pitmilly in M'Laren *v.* Buik, 1829, 7 S., 488, 9—per L. rk Hope in Alcock *v.* Easson, 1842, 5 D., 363—and *per eund.* in Cochrane *v.* 1841, 4 D., 79. (*s*) Douglas, Heron, & Co. *v.* Richardson, 1784, M., Nat. Bank *v.* Hope, 1887, 16 S., 177. See also Ferrier *v.* Errol, 9th July 1811, ted *supra*, § 431. (*t*) Lamb *v.* Dunn (First Division), 14th June 1854, 4.

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recent case, Lord Kinloch, in a note to an interlocutor, not reclaimed against, adopts this view of the Act. His Lordship says,—"The action in which the called to pronounce judgment, if beyond the three years, can admit no other han writ or oath), "and the consideration of any other action is irrelevant;" Lazzaroni, 1859, 21 D., 801. But the opposite view, stated in the following n, has been adopted by both Divisions of the Court. See Lamb *v.* Dunn and Monklands Railway Co., *infra*.

defence; and, 2d, That as the creditor had within the
period "pursued" for his claim before a competent tribuna
a competent form, and had therefore used proper statuto
for excluding prescription, he could not be held to have
benefit of his procedure in consequence of its having fai
causes beyond his control and for which he was not to bla
Court went in a great measure upon the decisions in whic
ing the claim in competitions of creditors, and by way of
sation to a judicial claim by the debtor, had been held to
prescription. Lords Ivory and Rutherfurd, however, obse
the terms of the statute seem to contemplate both an
which prescription would be pleaded, and a previous action
that plea might be barred.

§ 498. This case supports another important principle
that the term "action pursued" in the Acts 1579, c. 83,
c. 9, and "action commenced," &c., in the Act 12 Geo. I
are not limited to actions which the creditors raise by libel
monses; but include every appropriate procedure which t
tor may timeously adopt for following forth, prosecuting,
ing for his debt. The real point, therefore, in the question
any previous procedure has excluded the prescription o
whether the creditor within the three years took proper
making good his debt by a libelled action, by a referen
properly embraces the debt, by claiming upon it in a comp
his debtor's creditors, by pleading it in compensation or r
sation against a debt due by him to his debtor, or by
competent step. If he has done so, the triennial prescrip
not be pleaded in any subsequent action at his instance fo
good his claim. But while the death of the referee in th
a submission, the inadequacy of the debtor's funds in a cas
petition, or any such contingency for which the creditor i
sponsible, will not exclude him from the benefit of his tim
cedure, the prescription will not be barred by an action w
failed in its purpose from its original incompetency, from
quacy to make the claim effectual, or from its having be
doned by the creditor.[8]

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[8] In a still more recent case, the views of the judges of the First Divi
case of Lamb *v.* Dunn were fully adopted by the judges of the Second D
was expressly recognised that a "pursuit" within the years of prescription,
successful, might obviate the defence of prescription when pleaded for that
subsequent action, and so enable the pursuer of that subsequent action to

9. Yet if the debt has been pleaded by way of compensa-
ainst a debt of smaller amount, it seems that the creditor by
a has preserved his claim for the whole debt from the trien-
scription (*u*).

0. It was observed in the case thus referred to that the
interrupt" is not properly applied to the procedure by which
rter prescriptions are barred or excluded; but is only ap-
e to the long prescriptions (*w*). The word "elide" expresses
correctly; although it has sometimes been applied to proof
debtor's writ or oath, by which the debt after having pre-
may be proved (*x*). It has also been observed that these
y limitations of the proof are inappropriately termed "pre-
ns" (*y*). As, however, that term is applied to them in the
the Act 1669, c. 9, and in the rubric of the Act 1579, c. 83,
as by all our institutional writers, there is not much ground
lenging it; and, if properly understood, it does not occasion
onvenience (*z*).

1. When the claim falls within any of the classes enu-
in the statute, and has not been followed forth within the
ars, it prescribes, whether it is made by way of action or

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r curiam in Lamb *v.* Dunn, *supra.* (*w*) Per L. President and Ruther-
mb *v.* Dunn, *supra*—Napier on Prescription, 716, *et seq.* (*x*) See cases
n Napier, 775; and per L. Rutherfurd in Lamb *v.* Dunn, *supra.*
r L. Justice-Clerk in Alcock *v.* Easson, 1842, 5 D., 362. (*z*) See per
rfurd in Lamb *v.* Dunn, *supra,* and in Cullen *v.* Smeal, 1853, 15 D., 882.
ugham speaks of the triennial, sexennial, and vicennial "prescriptions" in
pman, 1837, 2 Sh. and M'L., 730.

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oof *prout de jure.* But it was laid down that the claim within the years of
n, to have this effect, must have been made and urged in a competent judi-
ding in which it could receive effect. A mere notice of a claim would not be
nor a claim in an incompetent process; nor a claim made in a competent pro-
bandoned. In this case the action was brought, in 1851, for the price of fur-
nade in 1842. The defender pleaded prescription, and the pursuer pleaded
lefence was obviated by what had taken place in an action raised in 1843
fender against him, the pursuer. In that process he (then defender) had
t he had the claim for the price of the furnishings in question, and pleaded
aim for it should be reserved. He was successful in throwing out that ac-
Court held that, as he had done nothing in the previous process but make
of his claim, the defence of prescription was not obviated, as such an inti-
d not amount to pursuit in the sense of the Act; Eddie *v.* Monklands Rail-
1855, 17 D., 1042. An action within the years of prescription, made and
, will not obviate the plea of prescription; Gobbi *v.* Lazzaroni, 1859, 21

as a defence of compensation (*a*). So a prescribed acc held not to entitle the creditor to vote in the election of on the debtor's sequestrated estate (*b*). And the same applied to a prescribed bill, fortified by the circumstance holder was the concurring creditor in the petition for th sequestration; which the Court considered did not, in a tion of the debtor's creditors, import the statutory adm resting-owing (*c*).

§ 502. But it has been held more than once that in accounting between the parties, one of them may not triennial prescription to individual items charged against

II.—*Proving the debt after it has incurred prescript*

§ 503. It has already been observed that the effect o 1579, c. 83, is to lay on the creditor the burden of prov the constitution (*e*) and the subsistence of the prescribed to limit his proof to the debtor's writ or oath (*f*); admi the debtor on record, however, binding him in the mod noticed (*g*).

§ 504. It is not necessary that the writ by which the tion or subsistence of the debt is proved should be either or holograph (*h*). An unsigned memorandum, holograp debtor, and found in the creditor's repositories, has tained (*i*). And a document which truly applies to th question, but without expressly referring to it, will suffice

(*a*) Dickson *v.* M'Auley, 1681, M., 11,090—Galloway *v.* Galloway, 1799 —Balfour *v.* Landails, 1683, M., 11,216. See also Paterson *v.* Strachan, D., 480—Miller *v.* Baird, 1819, ib.—Berry's Reps. *v.* Wight, 1822, 1 S., 433

(*b*) Wink *v.* Mortimer, 1849, 11 D., 995. (*c*) Lockhart *v.* Mitch D., 1341. (*d*) So held where the items challenged were a law-agent Boyes' Tr. *v.* Hamilton, 1829, 7 S., 815—and where they were for furnishin Brunton *v.* Angus, 1822, 2 S., 61—and the salary of a factor; Smith's cl Winton, 1714, M., 4062, 11,096. See *contra*, Paterson *v.* Strachan, 1808, H

(*e*) The term "constitution" of the debt is objectionable, because its us per meaning is the decree or document by which a debt is made liquid. of prescription, however, it has become the common term for expressing contraction or existence of the obligation. (*f*) See *supra*, §§ 40 cases in following notes. (*g*) *Supra*, § 407, *et seq.* (*h*) M Hunter, 1850, 13 D., 1111—Hyslop *v.* Howden, 1843, 5 D., 507—Black *v.* S 1823, 2 S., 118. (*i*) Donaldson *v.* Murray, 1766, M., 11,110 Hunter & Co., 1841, 3 D., 583—Watson *v.* Johnstone, 1846, 18 Sc. Jur., the creditor's writ found in the debtor's repositories, see *supra*, § 450.

(*k*) Davidson *v.* Hay, 1799, Hume D., 460—Stevenson *v.* Kyle, 1849, 1 12 ib., 673.

5. If the constitution of the debt is proved by the debtor's admission on record, the reference to his oath may be limit- e fact of resting-owing (*l*).

6. I.—With regard to proving the *constitution of the debt*, e principles apply as in cases under the sexennial and quin- l prescriptions, namely, that the pursuer will fail in his nless the defender admits that a debt was contracted, or circumstances from which that must be inferred (*m*). Thus tion for payment of a law-agent's account, where the de- leaded on record that the account had been incurred in a which had been carried on in his name, but in which he mated to the pursuer that he did not intend to appear per- whereupon the latter had agreed to conduct the case for f trustees, of which the defender was one; the Court held qualified admission did not prove the constitution of the . So that fact is not proved where the defender states on r in his oath that the goods were furnished in order to ex- a counter-claim by him against the pursuer (*o*); or that re furnished on the credit and obligation, not of the defen- of a third party (*p*). So in an action for payment of a con- r's account, where the defender admitted that his family lt with the pursuer, but stated that he knew nothing about unt sued for, as all such household matters had been under ge of his deceased wife, constitution of the debt was held e proved (*r*). And where a party sued for payment of ser- ages admits the service, but adds that it was rendered in or board and maintenance, and on the footing of wages not yable, the constitution of the debt is not proved, because ged obligation to pay wages is expressly denied (*s*).

7. On the other hand, where an action for payment of a

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ns *v.* Steele, 1853, 16 D., 317—Wilson *v.* Strang, 1830, 8 S., 625.

ora, § 443. (*n*) Scott *v.* Donaldson, 1831, 10 S., 107.

npbell *v.* Grierson, 1848, 10 D., 361—Lauder *v.* M'Gibbon, 1727, M., 18,206.

yer & Mortimer *v.* Lennard, 1851, 14 D., 99. In this case Lord Justice- e observed, "Suppose the case of an action for a dinner bill; and the question Did you eat the dinner? and the answer was, I did; but it was as a guest— not prove the constitution." (*r*) Fyfe *v.* Miller, 1837, 15 S., 1188.

ock *v.* Easson, 1842, 5 D., 356—Shepherd *v.* Meldrum, 1812, Hume D., 394.

on *v.* Halley, 1847, 9 D., 1222, the Court sustained the pursuer's claim for ar as not prescribed; because the legal presumption was, that the service had endered gratuitously. But the pursuer acquiesced in the Lord Ordinary's sustaining the defence as to the wages beyond the triennial period. See Naughton *v.* M'Naughton, 1813, Hume D., 396.

point in dispute (*f*). So where the debtor, in answer to from the creditor threatening legal proceedings for the deb to him that he would attend to it in the course of a few farthest, and hoped the creditor would put himself to no trouble about it, the Court held that resting-owing was pr the writen promise of payment after the three years had exp So in an action for payment of a law-agent's account after tion, where the constitution of the debt was proved by the the debtor within the three years, resting-owing was hel proved by his letter, dated after that period, which, referrin creditor's demand for payment, reminded him of the way i the employment had been undertaken, and added, "I do myself liable, and decline to recognise any claim by you me" (*h*).[10]

§ 510. The mere fact that the books of the debtor do tain an entry of payment of the debt (however important cumstance might be, if a proof at large were admissible) satisfy the statutory requirement of proving the debt by the writ (*i*). A distinction, however, has been taken on this p tween the books of the debtor himself and those of one wh treasurer, cashier, or the like, of the debtor, when a corpor similar body. Thus where the debtor was a burgh, the wa entry of payment in the books of the treasurer was held resting-owing against the corporation (*k*). And where a the affairs of a sequestrated bankrupt, made up by an acc under the authority of the creditors, before the three years pired, bore that the pursuer's account was due for furnishin

(*f*) Smith *v.* Falconer, 1831, 9 S., 474. The factor's writ was held to bin stituent, owing to the nature of the factor's employment. (*g*) St Kyle, 1850, 11 D., 1086; 12 ib., 673. (*h*) Macandrew *v.* Hunter, 18 1111. (*i*) Cuming's Tr. *v.* Simpson, 1825, 3 S., 545. The Court see taken the same view in Black *v.* Shand's Crs., 1823, 2 S., 119 (3d objection). Berry's Tr. *v.* Bogle, 1822, 1 S., 402 (new ed.), the report of which is very tory as to the grounds of decision. (*k*) Leslie *v.* Magistrates of Bre November 1808, F. C.—Muirhead *v.* Town of Haddington, 1748 (Kilkerran M., 2507.

[10] In an action in 1854 for the price of furnishings in 1844, the defend prescription, and the pursuer in reply founded on the following passage written to him by the defender in 1848,—"The number of gallons is correct; charged about 1s. 6d. per gallon more than the agreed price." The subsisten debt after the three years was held to be proved by writ, and proof *prout de* amount was allowed; Fife *v.* Innes, 1860, 23 D., 30.

nd the trustee's books did not contain any entry of payment, sistence of the debt was held to be proved (*l*).

1. These cases were decided before the leading case of Al- Easson (*m*), where the Court, led by the Lord Justice-Clerk eturned to an accurate construction of the statute 1579, c. 83. ecently, where the trustee on a sequestrated estate died after the last item of an account incurred to the law-agent e had employed for the estate, and where no successor had pointed to the trustee, and no procedure had taken place in estration (which was still subsisting) after his death; in an y the law-agent against the creditors on the estate, the eld that resting-owing was not proved by the want of an f payment in the books of the trustee (*n*). Three of the judges who decided this case adopted the judgment in the s case of Leslie *v.* the Magistrates of Brechin (*o*), but refused nd the rule there followed to the circumstances of the case hem. But the Lord Justice-Clerk took a broader view, and ged the previous decision (*p*). His Lordship observed,— the statute the debt *is to be proved by the writ* of the debtor. sence of entries of payments where one might expect to find in the books in which they ought to have been entered or may create the strongest suspicion or moral belief that the s not paid. But is not that mistaking what the statute re- which is, that the debt shall be *proved* to be still due *by the* hat is, the *actual* writ, acknowledgment, entry, or other g which *positively establishes* it to be unpaid." According to e of Leslie and the older case of Muirhead (*q*), the absence ntry of payment necessarily implies both that payment was de by the treasurer or by any other person on behalf of the and that the debt was not discharged by compromise, trans- or in any other way. It is thought that such an inference warranted by a proper construction of the statute.

2. Payments of interest on the debt, and payments to ac- f principal, after the three years have expired, are held to esting-owing, provided they are instructed by the writ of the

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nchanan *v.* Mags. of Dumfermline, 1828, 7 S., 35. But where the treasurer of ad not kept books, and certain accounts in his possession relative to the matter id not contain entries of payment of the account, the Court sustained the de- rescription in favour of the burgh; Ker *v.* Mags. of Kirkwall, 1827, 5 S., 802. lcock *v.* Easson, 1842, 5 D., 356. (*n*) Ellis *v.* White, 1849, 11 D., (*o*) *Supra* (*k*). (*p*) See also his Lordship's remarks in Cullen 15 D., 873, 4. (*q*) *Supra* (*k*).

debtor. But payments which were either made within t
scriptive term, or which are proved by the creditor's writ,
sufficient for this purpose (*r*). And in regard to payment
count of principal, it will be observed that the debtor's w
prove that they were made *as such;* for a mere payment o
of the sum originally due, not being a payment to accou
not infer that the difference is resting-owing (*s*).

§ 513. Where a prescribed account appeared in a state
which had been prepared by the trustee under a trust-deed
hoof of the alleged debtor's creditors, resting-owing was hel
be proved by the entry, as that was not shown to have bee
rised by the debtor (*t*). But the writ of a person autho
bind the debtor will meet the requirement of the statute (*u*

§ 514. Where action on a prescribed account was rais
Sheriff-court, and the Sheriff decided that the pursuer had
establish the debt by the defender's writ, and afterwards
oath emitted by the defender on a reference to be negati
where the pursuer having advocated against these judgme
Lord Ordinary held that he had failed to establish either
stitution or the subsistence of the debt by the defender's oa
the pursuer reclaimed against that judgment, and prayed t
to find the oath affirmative of the reference; the Court held
was not entitled to contend before them that the debt h
proved by the defender's writ (*w*).

§ 515. When the pursuer's proof of the subsistence of
depends on the defender's oath, the same rules apply as in
the sexennial prescription (*x*); namely, that the defende
entitled merely to depone "not resting-owing"; but must
the grounds on which his general denial is founded; and t
will only give effect to his denial, when they consider it to
ported by the detailed statement (*y*).

§ 516. If, however, the debtor depones that he paid t

(*r*) See the cases cited *supra*, § 450. (*s*) See Darnley *v.* Kirk
8 D., 441, particularly Lord Mackenzie's opinion. (*t*) Fyfe *v.* M
15 S., 1188. (*u*) See Leslie *v.* Mag. of Brechin, *supra*, § 510—B
Mag. of Dunfermline, *supra*, ib.—M'Andrew *v.* Hunter, 1851, 13 D., 1111.
cases noted *supra*, § 451, and in the chapter on admissions by factors and tru
(*w*) Meyer & Mortimer *v.* Lennard, 1851, 14 D., 99. (*x*) *S*
(*y*) 1 Bell's Com., 333—Callender *v.* Wallace, 1717, M., 9416—*supra*, § 4

[11] The minute of a meeting signed by the chairman is the writ of the
and, probably, in some circumstances, may be the writ of those who attend th
Johnston *v.* Scott, 1860, 22 D., 393.

nnot specify the time or circumstances, his oath will be held prove resting-owing (z). Nor does the oath prove the sub-e of the debt, where the debtor depones that he did not pay f, if he states that he took proper steps for securing payment h the medium of a third person; and in such a case it is not ary that he should depone that payment was actually made creditor by the person so interposed (a). Thus where a de-deponed that he believed the account sued for had been ecause he had given money to his manager for the purpose, at he "did not know of his own knowledge" that the mana-d paid the pursuer accordingly, and that he was not aware of seen any voucher for the payment, the Court held that the lid not prove resting-owing (b). And they took the same n an action for payment of an apothecary's account, where fender deponed that he gave his late wife money to pay his ts, and particularly the one sued for; and that she told him id them accordingly (c). This principle was recognised in r case, where, however, the Court seemed inclined to draw a tion between the debtor's oath that he had given money to ctor or wife to pay the account, and his oath that he had l money to a friend or special mandatory for the same pur- But this case (d), and another (e), in which the same point ised, were compromised before decision.

17. In like manner resting-owing is disproved by the debt-th that he paid to a person having the creditor's authority to e the money, *e.g.*, his partner (f), or some one who appears the circumstances to have been authorised to receive pay-(g). But where the defender deponed that he had paid to rsuer's traveller, without seeing that that person had written ity to receive payment, and without seeing other debtors of rsuer pay to him, resting-owing was held to be proved; be-the only alleged payment had been to one whose discharge ot binding on the creditor (h).

18. Where the debtor depones that payment was made by ctor or agent, and that his knowledge of the fact is derived hat person's books or accounts, these will be held as imported he oath; and if they prove resting-owing, the Court will de-

See *supra*, § 454. (a) See *supra*, § 454, *et seq.* (b) Mackay 1849, 11 D., 982. (c) Stirling *v.* Stewart, 1797, 4 B. Sup., 383. Mette *v.* Dalziel, 1830, 8 S., 387. (e) Goodal *v.* Newton, 1825, note 387. (f) Nicolson *v.* Murray, 1702, M., 13,211. (g) Roy *v.* n, 1830, 8 S., 810. (h) Smith *v.* Ivory, 1807, Hume D., 462.

cide accordingly (*i*). But the debtor's deposition that l
the hands of another person (*e.g.*, his factor), does not de
question of resting-owing to the oath of that person, or m
ference to his oath competent (*k*).

The competency of referring to the oath of a *prac*
general manager is considered afterwards (*l*).

§ 519. With regard to oaths that the debt has been
sated, or has been extinguished by transaction, compr
nunciation, and the like, the same rules apply as in ca
sexennial prescription (*m*).

If the defender, admitting that the account is unsett
on record, or in his oath, that the charges are extravaga
the proper amount has been covered by partial payments,
will hold that the oath proves the subsistence of an unsett
and will ascertain whether any and what balance is due b
a proof, or a remit to persons in the pursuer's trade or bu

III. *Admissions by the Debtor's Representative.*

§ 520. Until recently, the law as to the application
ennial prescription in actions against the original debtor'
in an unsatisfactory state. According to the plain meani
act 1579, the creditor in a prescribed account is entitled
the debt—that is, both its constitution and subsistence
the writ or oath of his party; and, therefore, if the action
the heir of the original debtor, the proof of these facts m
the heir's writ or oath. This rule was followed without
in several older decisions (*o*); and its application has not
tioned in cases where the original debtor survived the th

§ 521. But in regard to cases where the original
died before the whole three years had terminated, the rul
to was overturned by a case which occurred in 1808.
case (*p*) an action was raised by the heir of Leslie, a
against the son and heir of Mollison, for an account incu

(*i*) Cooper *v.* Hamilton, 1826, 2 S., 728; affirmed 2 W. S., 59—Mackay
10 D., 89. (*k*) Mackay *v.* Ure, 1849, 11 D., 982. (*l*)
on oaths on reference. (*m*) *Supra*, § 456, *et seq.* (*n*) Bry
1825, 4 S., 180—Turnbull *v.* Borthwick, 1830, 8 S., 735—Smith *v.* Falc
S., 474—Ritchie *v.* Little, 1836, 14 S., 216—Napier *v.* Smith, 1838, 1 D.,
son *v.* Kyle, 1850, 12 D., 673. (*o*) Ord *v.* Duffs, 1630, M., 11,08
Tours, 1680, M., 11,089—Thomson *v.* E. Linlithgow, 1708, M., 11,093—
Hamilton, 1712, Rob. App. Ca., 32—Forrest *v.* Carstairs' Children, 1715,
Douglas *v.* D. Argyle, 1736, M., 11,102—Douglas *v.* Grierson, 1794, M., 11
(*p*) Leslie *v.* Mollison, 15th November 1808, F. C.

g an action against Mollison, in which his son had been sisted rty; a considerable part of the account having thus been ed for business on behalf of the defender personally. The er did not deny that the business had been done; but he believed the account, in so far as it was dated prior to his s death, had been paid by his father; and he pleaded the tri- prescription. Reference having then been made to his oath, oned that he did not know whether the account had been ed by his father or not; that he believed his father had paid nd every other account he had incurred to his late law-agent, had often heard his father say that Mr Leslie was indebted to ut that he (the defender) did not know that any settlement er taken place between them. On considering this deposi- ne Lord Ordinary repelled the defence of prescription. The ler having reclaimed, it was observed by the Lord President) that, "if the act 1579, c. 83, established a presumption that nts were paid during the currency of them, then the deposi- n the present case would afford no proof to elide such pre- ion. But that act establishes no such presumption. The nption it creates is, that the account has been paid during the that have run since it was closed. On that presumption the iption of that act rests. Now that is taken off by the depo- , which shows that this account has not been paid since it was l; and therefore there is no room for the prescription in this On these reasons (the report bears) the Court unanimously ed to the Lord Ordinary's interlocutor.[12] The opinion thus d received support from several cases (*r*); and, so late as July the First Division of the Court held that the triennial pre- ion "did not apply" to a case where the original debtor had luring the currency of the three years, and his heirs admitted they had not paid the account (*s*). This decision, however h altered the interlocutor of the Lord Ordinary), seems to have chiefly, if not entirely, upon the supposed conclusiveness of

Broughton *v.* Weston, 1826, 4 S., 496—Elder *v.* Gray, 1833, 11 S., 591—Ritchie le, 1836, 14 S., 216—Grubb *v.* Porteous, 1835, 13 S., 603—Per Lord Moncrieff in t *v.* Scott, 1844, 6 D., 894. (*s*) Auld *v.* Aikman, 1842, 4 D., 1487.

The statement in the text of the case of Leslie *v.* Mollison seems not exactly ac- . The account sued for, as appears from the Session papers, was a continuous nt, bearing to have been incurred in part by Mollison during his life, and partly defender, the heir of Mollison, after Mollison's death. But the defender deponed oath on reference, that before Mollison died, and before he, the defender, was in the process, Leslie had ceased to be the agent, and that the process was ht to a conclusion by another agent; and so that no part of the account incurred process after Mollison's death was incurred to Leslie.

previous decisions ; and, since the introduction of the mo
views on the shorter prescriptions, its correctness in pri
been more than once impugned (*t*).

§ 522. The question was at last brought before
Court (*u*), when their Lordships unanimously held that th
introduced by Lord President Blair, with its consequent
and *dicta*, was erroneous. It has thus been definitely s
where the creditor in an account sues the heir of the de
three years from the close of the account, he must pro
heir's writ, or oath, both the constitution and the subsiste
debt; whether the original debtor died during the curre
three years, or after they had terminated.[13]

CHAPTER VI.—OF INTERNATIONAL QUESTIONS OF PRESC

§ 523. Where an obligation has been entered into,
table in a foreign country, or where the contracting pa
resided abroad for a number of years, the question
Whether effect is to be given to the corresponding Scotch
prescription ?

§ 524. The first rule on this head is, that "Question
ing the prescription of heritage must be governed by the
place where the heritage lies, and from which it can
moved" (*a*).

§ 525. Moveable rights and obligations, however,
fixed *locus*, the prescriptions relating to them are subject
ent rules on this point according to their several characte
will be considered under the following heads (*b*) :—

(*t*) Per Lord Fullerton in Auld *v.* Aikman, *supra—Per curiam* in Paxt
1842, 4 D., 1515—Darnley *v.* Kirkwood, 1845, 7 D., 595—Per Lord Mack
douall *v.* Loudon, 1849, 12 D., 170. (*u*) Cullen *v.* Smeal, 185
The judges' opinions in this case contain a full analysis of all the previous
same view is supported by the cases of Ferrier *v.* E. Errol, 9th July 181
Stewart *v.* Douglas, 1823, 2 S., 226—which are noticed in Lord Rutherf
in Cullen *v.* Smeal. (*a*) Ersk., 3, 7, 49—Voet., Lib. 44, Tit. 3
term "heritage" will only include land and its accessories, not moveable
are heritable *destinatione.* (*b*) See the general classification of
supra, 402.

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[13] But "'his party' plainly includes both the immediate debtor and th
tive, where the action is brought against the representative; and this, the j
tion, is that which the statute has received in practice;" per Lord Rutherfu
v. Smeal, 1853, 15 D., 882.

rescriptions which do not affect the right or obligation, but mode of enforcing it; and which operate by limiting the action or the proof; *e.g.*, the shorter prescriptions above

hose which absolutely extinguish the obligation by an *ex o* operation, and not through the medium of an implied n limiting its duration; *e.g.*, the long negative prescription. hose which enter into the obligation at the outset, as im- nditions limiting its endurance; *e.g.*, the septennial limita- autionary obligations.

5. The law on the first of these classes of prescriptions has tled by a judgment of the House of Lords, proceeding upon d and elaborate opinion of Lord Brougham. The question the following facts. On 13th October 1809, Sir Alexander en a prisoner in France, accepted two bills at four months' awn by Fagan and payable to Lippmann, the place of pay- t being specified. He returned to Britain in 1810, before s became payable, and remained in this country till his 1826. After the bills fell due, and about four months after turn, Lippmann adopted proceedings in the French Courts him and Fagan. These proceedings were sufficient, accord- he law of France, to interrupt the French prescription (if le to the bills), and they resulted in a decree in absence, would not prescribe for thirty years. In 1829, nineteen ter the date of the bills, Lippmann raised action in Scotland Don's heir, libelling on the bills and decree. The defender pleaded the sexennial prescription, the Court of Session t it did not apply to the circumstances of the case. But se of Lords reversed the judgment, and decided that effect e given to the sexennial prescription. Some discussion the Court of Session as to whether France or Scotland was ld the *locus solutionis;* but in the House of Lords it was d to be France, which was the place of acceptance (*c*).

7. The ground on which the Court of Session proceeded in e was, that the debt having been contracted in France, was to discharge in accordance with the *lex loci contractus*, and escription was in effect a discharge *vi juris*. Consequently, French prescription had been excluded by the French de- e debt had been kept alive, and was not subject to the Scotch al prescription.

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n *v.* Lippmann, 1837, 2 Sh. and M'L., 682, 723, 728; reversing 14 S., 241.

Lord Brougham exposed the fallacy of this reaso
Lordship observed, "Whatever relates to the nature of the
—*ad valorem contractus*—is to be governed by the law o
try where it was made, the *lex loci;* whatever relates to t
by suits to compel performance or by action for a breach,
nem litis, is to be governed by the *lex fori*—the law of t
to whose Courts the application is made for performa
damages. This principle was the ground of the decisi
British Linen Company *v.* Drummond (*d*); and it has
followed in other cases; as De La Vega *v.* Vianna (*e*), an
bey *v.* Vignier (*f*), and Huber *v.* Stenier (*g*). But it h
cognised long before the case of the British Linen Compan
mond, particularly in Williams *v.* Jones (*h*), upwards

(*d*) British Linen Company *v.* Drummond, 1830, 10 Barn. and Cres
an obligation which had been entered into in Scotland, where the plainti
business and the defendants resided, being sued upon in England after s
its date, the Court of King's Bench held that the case fell within the Eng
limitation, and that the obligation was not kept in force for forty years, th
scription applying to it by Scotch law.

(*e*) In De la Vega *v.* Vianna, 1830, 1 Barn. and Adol., 284, it was hel
of King's Bench that where foreigners who had had transactions in Port
England, and one of them caused the other to be arrested for the debt acc
transactions, the latter was not entitled to be discharged from custody, b
law of Portugal he was not subject to arrest for the debt. The Court dis
tween the interpretation of the contract, which must be by the *lex loci*
the remedy, which is regulated by the *lex fori debitoris.*

(*f*) In Trimbey *v.* Vignier, 1834, 1 Bing. New Ca., 151, a blank in
France of a bill drawn there was held by the Court of Common Pleas not
ferred the property of the bill, because by the law of France it had n
Chief-Justice Tindal observed, in giving judgment, "the rule which appli
of contracts made in one country and put in suit in the courts of law of an
appears to be this, that the interpretation of the contract must be govern
of the country where the contract was made (*lex loci contractus*), the mod
the time within which the action must be brought must be governed by t
country where the action is brought (*in ordinandis judiciis loci consuetud*
His Lordship referred to Huber, *De Conflictu Legum*, (Praelec., vol. 2, tit. 3
to the cases of the British Linen Co. *v.* Drummond and De la Vega *v.* Vi

(*g*) In Huber *v.* Stenier, 1835, 2 Bing. New Ca., 202, promissory n
France were held by the Court of Common Pleas not to be subject to the
quennial prescription, which only applied to the *tempus et modum actionis*

(*h*) In Williams *v.* Jones, 1811, 13 East., 439, an action for repaym
expended on behalf of the defendant in India was sustained in the C
Bench in England after six years, because the English statute of limitat
cases where the defendant had been beyond seas during the statutory t
action was held not to be barred in consequence of the defendant hav
India for six years after the cause of action arose, which residence had re
for the debt incompetent in India.

go; which, indeed, could not well stand upon any other Then, assuming this to be the settled rule here, the only is, Whether the limitation of action belongs to the contract emedy? But some of these cases also decide that question. termined affirmatively both in the British Linen Company mond and in Huber *v.* Stenier; it is assumed as clear in s *v.* Jones."

learned lord then disposed of the argument that statutory ns of the mode of proof are of the nature of the contract, nerely of the remedy; and he observed, "The parties looked mance only, and to the time of performance; the argument them to have looked to a breach. The contract was to certain time; and if a breach was at all in contemplation, condary undertaking was engrafted upon that contingency, only be an undertaking to answer for the consequences of the breach, the damage arising from the breach, and to until it was made good. But nothing can be more violent supposition that the breach of the contract is in the con- on of the parties, and, indeed, nothing more contrary to h. It is supposing that when men bind themselves to do a ning, they are contemplating not doing it, and considering law will help them in the non-performance of a duty."

Lord Brougham's exposition of the law is supported by revious Scotch cases (*i*), and by the opinions of Scotch and

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Scotch prescription, being that of the *lex fori*, was sustained in the following Hay's Exrs. *v.* E. Linlithgow, 1708, M., 4504, the triennial prescription was an action for payment of an account incurred in London by a domiciled In Robertson *v.* Marquis of Annandale, 1740, Cr. and St., 293, an action of wages of a servant hired by a Scotsman in London being raised in Scot- ars after they were payable, the Court of Session and House of Lords held l under the Scotch triennial prescription, and did not subsist during the the English sexennial limitation. In Randal *v.* Innes, 1768, M., 4520; 5 ; Hailes, 225, S. C., the triennial prescription was applied in an action for n England to an artillery officer, who had resided in Scotland from the account till his death five years afterwards. In Ker *v.* E. Home, 1771, M., Sup., 541; Hailes, 408, S. C., the triennial prescription was applied to an nt of a house in London; the Court being "a good deal moved" by the aving a house in Scotland, which fixed a domicile, and rendered him the Courts of this country. In Barret *v.* E. Home, 1772, M., 4524; 5 B. C., the same decision was repeated, in an action for furnishings to the while in London. The point was again decided in Thomson *v.* Duncan, D., 466, which was an action for furnishings in London to a Scotsman there. In Campbell *v.* Stein, 23d November 1813, F. C., the triennial pre- s applied to an action by an English solicitor, for payment of his account

foreign jurists of eminence (*j*), as well as by the Engli
already noticed. It has been followed as a leading d
since it was pronounced (*k*); and the previous confli
which are analysed and refuted in Lord Brougham's
must now be regarded as over-ruled. Accordingly, wh
banking company, having an agency in England, ente
their agent into transactions with a party, on which a b
in their favour; and where in part payment of the balan
delivered goods to the bank agent, by whom they w
Scotland, the price having been received by the bank;
on the bankruptcy of the party, the balance claimed fr
by the bank was held in the English Courts to be an
as arising out of transactions struck at by the Bank
statutes; an action for repetition of the price of the g
then been raised in this country by the bankrupt's assi
the banking company, more than six years after the

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for business conducted for a domiciled Scotchman in an appeal case i
Lords; and this decision was affirmed on appeal; Lord Chancellor
that it had been ruled that "where the merchant creditor resides in E
debtor in Scotland, the latter may plead the triennial prescription."
Weston, 1826, 4 S., 496, it was agreed by the parties and the Court
incurred in England by a Scotchman resident there, was subject to th
scription.

The prescription of the *lex loci contractus* was held not to apply i
cases:—Robertson *v.* Marq. of Annandale, *supra.* In Garden *v.* Ra
4503, a bond granted in England being prescribed by English law whi
sided there, was sustained as the ground of action in Scotland, in resp
in the Scotch form between Scotchmen, and bore a clause for registra
tion in Scotland. In Rogers *v.* Cathcart, 1732, M., 4507, a bill drawn
Scotch supercargo on his constituent in Scotland and payable there, bei
after six years, the Court refused to apply the limitation existing in Vi
neil *v.* M'Neil, 1761, M., 4517, a bill accepted and payable in Ireland
be subject to the Irish statute of limitations, the defender (a Scotchma
sided in Ireland during the statutory period. In Ross *v.* Ross, 1811, H
same rule was applied in an action for repayment of money advanced i
in Banner *v.* Gibson, 1830, 9 S., 61, in an action for an accounting, wh
to account had arisen in England. In both of these cases the debtor
during the currency of the statutory period.

It will be observed that most of the cases thus noticed were partl
specialities of the debtor's real domicile, or his non-residence during the

(*j*) Ersk., 3, 7, 48—Kames' Equity, 3, 8, 6—Burge, Com., vol. 3
Confl. of Laws, § 576, *et seq.*—Voet, Lib. 44, Tit. 3, § 12—Huber
(Praelectiones, tom. 2), Lib. 1, Tit. 3, § 7. (*k*) See Farrar *v.* J
D., 949—Robertson *v.* Burdekin, 1843, 6 D., 17—Alexander *v.* Badena
—Strathern *v.* Masterman & Co., 1850, 12 D., 1087—*supra*, § 365.
and M'L., 731, *et seq.*

tion; the Court held it incompetent for the defenders to plead glish statute of limitations, being of opinion that the *lex fori*, t the *lex loci contractus* ought to regulate in regard to the prescription (*m*). In this case, therefore, the transaction raised the question took place in England; yet the English of limitations was held not to affect its legal consequences prosecuted in a Scotch Court.

29. The principles expounded by Lord Brougham are in ace with the statutes which enact the short prescriptions in untry, and which make it imperative on the Court to apply their appropriate writings and obligations, whether the *locus tus* be Scotland or a foreign country.

30. Upon these authorities it may now be laid down as law that a foreign contract or obligation, when sought to be d in this country, is subject to such Scotch prescriptions as limit the mode of proof or the right of action; and that on ner hand the Scotch Court is not bound or entitled to give to a prescription of either of those natures prevailing in the *contractus*. Moreover, the application of this rule does not on whether the debtor resided in this country during the ptive period.

31. At the same time, the fact that the debtor had dwelt in gn country during the period of prescription prevailing there, gh it does not entitle the Court of his subsequent domicile to fect to the foreign prescription, seems to raise a presumption ment; because it is probable that the creditor did not delay uting his right until prescription had run against him. But esumption will yield to contrary proof or inferences from the stances (*n*).

32. The law is not yet established regarding the international of prescriptions which extinguish the debt, but do not, as by plied condition, limit its endurance. The correct rule seems that if the obligant has resided in the *locus contractus* during sufficient to have entirely extinguished the obligation *vi juris* country, it will not revive on his removal to another country a similar prescription does not exist. This is the view of Story (*o*); whose observations are repeated with approval by

Farrar *v.* Leith Banking Company, 1839, 1 D., 936. (*n*) Kames' Equity, Ersk., 3, 7, 48—York Buildings Co., 1783, M., 11,403. (*o*) Story's f Laws, 582.

Mr Burge (*p*). It is favoured by the decision of Huber *v*
where Lord Chief-Justice Tindal carefully distinguish
foreign prescription which extinguishes the right, an
merely strikes at the remedy; and held that the foreign
pleaded in that case was of the latter class. Lord Ell
deciding Williams *v*. Jones (*s*), where effect was refuse
limitation of the right of action, observed, "If it go t
ment of the right itself, the case may be different."
Brougham in his admirable opinion in Don *v*. Lipp
served, "There is no occasion to question the doctrine
Dr Story in his able work, and approved of by the Cour
Pleas in Huber *v*. Stenier, that if the *lex loci contract*
obligation wholly void after a certain time, and if the
resided within the jurisdiction during the whole of t
may be taken as the guide of the Court where the acti
This may be true, and yet leave the present question (a
tions affecting only the remedy) wholly untouched."

The supreme Court of the United States has deci
in accordance with Mr Story's views (*u*).

§ 533. But while it would appear that the exti
debt by the party's residence in the *locus contractus* du
scriptive period there recognised, should be effectual o
to any other country, a party cannot shake himself
obligation entered into in one country, by removin
country and residing there during the years of a presc
would have extinguished the debt, if that country had
contractus; but the debtor when sued in the *locus c*
be liable so long as the debt is in subsistence accordi
there prevailing. This principle was fully recognise
lowing case, which involved a curious question as to th
of the debt against the foreign successor of the origin

§ 534. A party contracted debt in Scotland, an
trated. He afterwards went to Russia, where he resi
than ten years until his death; and he left a fortune th

(*p*) 3 Burge Com., 883. (*r*) Huber *v*. Stenier, 1835, 2 Bin
supra, § 527. (*s*) Williams *v*. Jones, 1811, 13 East., 449, *s*
(*t*) Don *v*. Lippmann, 1837, 2 Sh. and M'L., 730, *supra*, ib.
Grey, 11 Wheaton, 361, 371, 2, noted in Story's Confl., § 581. See al
inghame in Farrar *v*. Leith Banking Co. 1839, 1 D., 947. His Lor
minority in this case, which did not properly involve the question noti
(*x*) Richardson *v*. Haddington, 6th March 1821, F. C.; remitted by
2 Sh. App. Ca. 406.

ghter, a domiciled Scotchwoman, succeeded. She thereupon
n action in this country for having it declared that the
ad been extinguished by the Russian decennial prescription.
urt of Session, proceeding on the opinion of foreign lawyers
at prescription extinguished debts to which it applied, de-
in terms of the libel, holding that, although the Russian
tion would not have been a good plea in favour of the ori-
ebtor, it was sufficient to extinguish the debts, in so far as
uld affect his heir succeeding only to funds situated in
(y). The case having been appealed, the House of Lords
d of the principle adopted by the Court below, so far as it
l the original debtor; but considered that "it could not be
ed to the extent to which it has been pronounced, that the
e null and extinguished." Their Lordships accordingly found
debts were not extinguished. They did not decide as to the
of the heir; but remitted to the Court below to review
terlocutor appealed against, and to take a more full opinion
ussian lawyers upon the nature and effect of the sequestra-
egard to the question.

o the subsistence of the original debtor's liability in Scot-
twithstanding the Russian prescription, Lord Gifford (who
e case in the House of Lords) observed—"It is impossible
a person's removal to Russia or any other country where
ent law prevails from that in Scotland, he can discharge
from those debts; but he must, if he returns to that country,
e to be sued, leaving it open to him to avail himself of any
which the law of Scotland enables him to set up against
emands." His Lordship mentioned the English case of
. Buchanan (z), in the time of Lord Kenyon, as having been
on the same principles.

learned Lord was not so clear as to the heir's liability. On
nt he threw out his impression, without conclusively holding,
f, on the answer to the questions proposed to the Russian
it shall appear that by the law of Russia those debts could
recovered there, because a person in Russia acquiring right
ian law would in Russia be exempted from the payment of
bts, it would be difficult to say how, if this Russian came to
l, he would be affected in Scotland, he being relieved by the
Russia from those debts; and if that be the law in the case

e tenor of the opinions of the judges in the Court below is mentioned by Lord
his speech in the House of Lords. (z) Smith v. Buchanan, 1 East, 6.

of a Russian, it is difficult to say how it can be differen
the case of a Scotch lady."

This case does not appear to have come again befor

§ 535. The law is simple and clear as to prescriptio
properly limitations, which enter into the contract *ab*
implied conditions defining its endurance. There is
these in Scotch law, namely the septennial limitation o
obligations; as to which the act 1695, c. 5, "statutes
that no man binding and engaging for hereafter for and
conjunctly and severally in any bond or contracts f
money, shall be bound for the said sums for longer than
after the date of the bond, but that from and after th
years the said cautioner shall be *eo ipso* free of his cau
true effect of this enactment is, that the obligations
refers shall be read as if they contained a clause declari
should only last for seven years (*a*). Consequently this
of the nature of the contract, and not merely of the rem
statutory rule for interpreting obligations of a certain c
into in Scotland, and contracted with reference to the p
the statute. On the one hand, therefore, the septenni
ought to follow a Scotch cautionary obligation when s
another country; while, on the other hand, it should n
to a cautionary obligation entered into beyond Scotla
the parties did not contract on the footing that the oblig
be so limited.

§ 536. The case of Don *v.* Lippmann, and the au
which it proceeded, *e converso* support this principle;
ground of decision there was that the prescription o
contractus was not of the nature of the contract, but me
the remedy; and Lord Brougham laid down distinctly
terpretation of the contract must depend on the rules
tion applying to it in the place where it was entered in

§ 537. The principle has also been expressly sett
carefully considered case, where the septennial limitati
not to apply to a cautionary obligation executed in Rus
upon in this country (*b*). Lord Fullerton observed in
"If it could be held that the septennial limitation wa

(*a*) Ersk., 3, 7, 24—1 Bell's Com., 358—Scott *v.* Yuille, 1831, 5 W. S
Ch. Brougham—Alexander *v.* Badenach, 1843, 6 D., 322.
Badenach, *supra*.

inting out a particular time within which action must be , it would be impossible to deny that it would affect every t falling under its terms, in whatever country it was exe- f sued upon in this. . . . . But if the statute only ces a qualification of the contract itself, it is equally clear are bound to look to the *lex loci contractus*, and not to apply ute to a contract entered into in a country to which it does end." This decision gives completeness and consistency to rnational law of prescription.

TITLE X.

OF RESTRICTIONS OF THE MODE OF PROVING C FACTS.

§ 538. From an early period restrictions on the mode certain facts have been established in this country. sprung from the extreme distrust of testimony, and fro minence given to written proof, throughout the Scottish evidence. Accordingly, it will be seen that a proof at competent on most matters of importance on which might have secured written proof, or which from their apt to escape the recollection of disinterested witnesses. ral, these restrictions limit the party to his opponent's w on reference. But in some cases written proof is esse constitution of the right or obligation.—The considerati restrictions will lead us to notice incidentally, and by w trast, certain cases in which the proof is unlimited.

CHAPTER I.—PROOF OF MARRIAGE.

§ 539. When marriage is constituted by consent whether emitted *in facie ecclesiae*, before a magistrate before witnesses, the proof of it may be by parole, or by of party (*a*). And such consent may be proved by a w scribed by the parties, although neither holograph nor pro

(*a*) M'Adam *v.* Walker, 1813, 1 Dow, 148; 5 Pat. App. Ca., S. C.—S Ersk., 1, 6, 5, Ivory's Note—Bell's Pr., § 1518—More's Notes, 13—1 Fr Dom. Rel., 147. (*b*) Wyche *v.* Blount, 1801, M., "Forum Com No. 2; Ferg. Con. Rep., 27, S. C.—per Lords Fullerton, Mackenzie, a Mackenzie *v.* Stewart, 1848, 10 D., 611—Fraser, *supra*.

[1] Matrimonial consent may be expressed by an acknowledgment by t made in presence of the other. Thus a marriage was held to be contra

). A marriage constituted by consent inferred from cohabi-
s man and wife may also be proved *prout de jure* (*c*).

. The pursuer of a declarator of marriage founded on pro-
d subsequent *copula*, can only prove the promise by the
's writ or oath on reference (*d*). At one time it was thought
rriage could be constituted by courtship (as equivalent to
) and consequent *copula*, the courtship being proveable by
e). But the Court have deliberately decided that such a
' constituting marriage does not exist in this country (*f*).

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r, *supra*—Ersk., 1, 6, 6—Bell's Pr., § 1518. (*d*) Harvie *v.* Crawford, 12,388—Millar *v.* Tremamondo, 1771, M., 12,395—Cockburn *v.* Logan, 1670, —Stewart *v.* Lindsay, 1818, Hume D., 380—Sim *v.* Miles, 1829, 8 S., 89, 96, t-Cl. Boyle—Mackenzie *v.* Stewart, 1848, 10 D., 611—Monteith *v.* Robb, 1844, -1 Fraser, 197. (*e*) Bell's Pr., § 1519—More's Notes, 13—Tait on Lothian, Consist. Law, 41, 2. The doctrine stated by these writers was er-deduced from the following cases, where the Court allowed a proof before an-e pursuer's allegation, thus avoiding a decision on its relevancy—Smith *v.* 1755, M., 12,391; Ferg. Con. Rep. 134, S. C.—Harvie *v.* Inglis, 1837, 15 S., *v.* Allardice, 1794, not rep., noted in Harvie *v.* Inglis. See these cases com in 1 Fraser, Pers. and Dom. Rel., 192. (*f*) Monteith *v.* Robb, 1844,

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nent in these terms,—"I do hereby acknowledge Agnes Fleming to be my ten and signed by Robert Corbet in presence of Agnes Fleming, and given epted by her; Fleming *v.* Corbet, 1859, 21 D., 1034. But parties do not ne-ontract marriage by such a document, however unambiguous; because proof nt that it was granted for some other purpose, as, for instance, with the design g other persons; Fleming *v.* Corbet, *supra*, § 174, note 15. In a late case be-parishes as to liability to aliment a female pauper, where the liability de-the validity of her alleged marriage, the Court held the marriage not esta-ough both she and the man whom she claimed as her husband deponed that xchanged matrimonial consent,—the Court thinking that the rest of the evi-wed that the parties had not intended marriage; Beattie *v.* Baird, 1863, 1 3. Where a female pursuer of a declarator of marriage alleged that the defen-n several occasions, acknowledged her as his wife in presence of third parties, her presence, the Court held the averments irrelevant; because these acknow-, made when the pursuer was not present, could not constitute marriage; and e pursuer did not aver that there had been any consent of which these ac-nents could be held to be the proof: Little *v.* Halliday, 1855, 17 D., 578. imonial consent has taken place may be proved by subsequent acknowledg-eslie *v.* Leslie, 1860, 22 D., 993—Longworth *v.* Yelverton, 1862, 1 Macpher-5 Jur., 101, and separate report, 1863. In Leslie *v.* Leslie, in an action by tor her husband's death, marriage was held established by the terms of a corre-between them, in which they addressed each other as husband and wife. In *v.* Yelverton the acknowledgments proved were held by Lord Ardmillan and by Lord President M'Neill to be insufficient proof of the previous con-the opposite view was entertained by Lords Curriehill and Deas. The case ppealed.

Proof of courtship, however, may be of great importance as (ing the conduct of the parties where the meaning or obje defender's writ is in issue (*g*).[2]

§ 542. The question arose in a recent case (*h*) Whethe ing signed by a party, but neither holograph nor tested, cou his promise, and being followed by *copula*, constitute a m The Lord Ordinary, holding the writing to be sufficient, favour of the marriage; but in the Inner House his L judgment was reversed, on the ground that there was ver reason for believing that the promise had been fraudently above a signature which the defender had written on the some different purpose. Lords Mackenzie, Fullerton, an concurred in holding that the law does not require the wri mise to be either holograph or tested; the defender's sub to a promise in another person's handwriting being suffici vided the Court are satisfied that the document was tru by the defender, and delivered to the pursuer as a promis riage. The Lord President did not pronounce an opinio general question.

§ 543. It is not necessary that the writing, if genuin contain a specific promise of marriage; but it will be su such is its fair import. The promise may also be inferred tenor of a course of correspondence (*i*). In like manner, t may infer a promise from facts admitted by the defender in on reference, notwithstanding his denial of it (*k*).[3]

(*g*) Honeyman *v.* Campbell, 1831, 5 W. S., 92—Monteith *v.* Robb, *supra.*

(*h*) Mackenzie *v.* Stewart, 1848, 10 D., 611. (*i*) Honeyman *v* 1831, 5 W. S., 144—per Lord Just.-Clerk Hope in Monteith *v.* Robb, 1844,

(*k*) Stewart *v.* Lindsay, 1818, Hume D., 380.

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[2] Ross *v.* Macleod, 1861, 23 D., 972—Longworth *v.* Yelverton, *supra.*

[3] "The promise which the law requires in such a case must be a promis accepted, or a betrothal;" Lord Curriehill, in Ross *v.* Macleod, 1861, 23 D this very important case on this branch of the law, the defender had give promise to marry the pursuer. There had previously been courtship and (jority of the Court thought) intercourse between the parties; but the Court evidence, that there had been no *copula* subsequent to the written promise. question was, Whether there had also been a verbal promise prior to the i and the Lord Ordinary (Kinloch) thought that, although the verbal promis be proved by witnesses, yet that facts and circumstances might be establishe evidence, out of which the Court might infer that a promise had been made view was explicitly rejected in the Inner House, and it was held that the pr not be competently proved in that way. The Lord President (M'Neill) state

4. The author of an able and learned treatise is of opinion promise may be proved by the defender's judicial examin-). It is thought, however, that correct practice does not his procedure, the general rule excluding it on matters which be proved by parole (*m*).

Fraser, Pers. and Dom. Rel., 197. In Sawers *v.* Forrest, 1786, noted in 1 1, the pursuer was judicially examined without objection. Mr Fraser (ib.) that the same course was followed in Stewart *v.* Lindsay, 1818, Hume D., 380. pears from the report that the defender in that case was examined on oath, Commissaries had decided that the proof could only be by writ or oath.

ee Tarbet *v.* Bennet, 1803, Hume D., 500—Porteous *v.* M'Beath, 1812, ib., 98 on *v.* Hamilton, 1824, 3 S., 283—M'Master *v.* Brown, 1829, 7 S., 337—Alcock , 1842, 5 D., 356. See on judicial examinations, *infra*, Part ii, b. ii, tit. 2,

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as follows:—"The promise which is requisite in order to make marriage, by its being followed by intercourse, is a promise as to which the proof is of a limit- It must be proof by the writ of the party, or by the oath of the party. The st derive its knowledge of the promise direct from the party himself, either hand or from his mouth, and if it comes from his mouth, it is not to be dis- ough the recollection or evidence of parties who repeat it. It must come direct party to the Court. It must be admitted by him on oath, and if so, that would e proof, for we do not require proof of what is admitted on oath. The fact of ving been a previous courtship may, in some cases, be a fact of importance in enable us to read with more certainty the document, or series of documents, or correspondence. But still it is from this document or series of documents con- the correspondence that the evidence is deduced. They may require construc- l the facts that enable you to construe them may be important. But still the is the evidence of the party." This view of the law was fully recognised in th *v.* Yelverton, *supra*. In Longworth *v.* Yelverton Lords Curriehill and Deas, ned the majority, held the facts to be, that there had been a promise of mar- Scotland; that the first intercourse between the parties had subsequently taken Ireland; that the parties had afterwards returned to Scotland, and that inter- ad then taken place there,—and they held that marriage was constituted by ise and subsequent *copula* in Scotland. The Lord President dissented, on the hat assuming that there had been a promise in Scotland, which he doubted, still *la* could not be connected with the promise. The *copula* must be in Scotland; it is necessary that the promise should also have been given in Scotland ap- ubtful; per Lord President in Longworth *v.* Yelverton. It would appear that omise be preceded as well as followed by intercourse, as if it take place in the f an illicit cohabitation, marriage may be, but is not necessarily constituted; as in Macleod *v.* Ross, *supra*. Previous illicit intercourse raises a presumption a marriage, or interposes an obstacle in the way of proving it, if the mode of tion alleged be promise *subsequente copula*, and still more if cohabitation and d repute be the ground of the marriage. But if it be alleged that a marriage n constituted by consent, no adverse presumption arises from the previous illicit rse; per Lord Justice-Clerk Inglis, Fleming *v.* Corbet, 1859, 21 D., 1034.

§ 545. The subsequent *copula* may be proved *prout c*
including the defender's judicial examination (*o*).[4]

CHAPTER II.—PROOF OF OBLIGATIONS REGARDING HER

§ 546. Heritable rights have long been considered too
to be constituted or transmitted by verbal contract. V
essential to all obligations regarding this class of rights;
has been adhibited either party may resile as from an
bargain (*p*). This rule applies where one of the parties
out having resiled, before the writing had been executed
where a contract regarding heritage stands on offer and a
the latter as well as the former must be in writing; oth
of the parties would be bound, and the other free (*s*). V
order to constitute or transmit heritage must be regularl
holograph (*t*). Consequently, when the obligation stands
missives, both documents must have one or other of th
sites (*u*).

§ 547. These rules apply to the constitution and tr

(*n*) Harvie *v.* Crawford, 1732, M., 12,388—Reid *v.* Laing, 1831, 1 Sh.
449—Ferg. Con. Law, 115. (*o*) Sawers *v.* Forrest, *supra*—Reid *v*
(*p*) Stair, 1, 10, 9—Ersk., 3, 2, 2, and 4, 2, 20—1 Bell's Com., 328—
65. (*r*) Oliphant *v.* Monorgan, 1628, M., 8400. (*s*) Ersk.,
on Ev., 221. But a written promise does not require a written acceptance
Paterson, 1748, M., 8440—Muirhead *v.* Chalmers, 1759, M., 8444. It is
delivery; Fulton *v.* Johnstone, 1761, M., 8447. (*t*) Ersk., 3,
Com., 328—More's Notes, 65. (*u*) Ersk., 3, 2, 2—Barron *v.* R
8463—More's Notes, 66.

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[4] The Act for amending the Law of Marriage in Scotland, 19 and 2
provides, § 1, that after 31st December 1861 no irregular marriage contra
land by declaration, acknowledgment, or ceremony, shall be valid, unle
parties had his or her usual place of residence there, or had lived there f
days preceding; and (2) that any persons so contracting an irregular m
within three months, apply to the Sheriff of the county and prove their
the residence of one of them in Scotland for the requisite period; that th
then certify the marriage; that it shall be entered in the Register of M
that a copy of the entry shall be received "in evidence of such marriage
residence."

of property in land, but also of inferior real rights, *e.g.*, securities and servitudes (*x*).[1]

. Leases of heritable subjects may be proved by parole he duration is only for one year (*y*). But writing is essen- he constitution of a tack for a longer period (*z*). And if a

air, 1, 10, 9—1 Bell's Com., 328—More's Notes 220—Kincaid *v.* Stirling, ., "Servitude," No. 4. But see Johnstone *v.* Aitken, 1829, 7 S., 732, where in the peculiar circumstances, allowed a proof before answer of an alleged *minis.* In Mutrie, 26th June 1810, F. C., the rubric is—"A servitude *ne officiatur* constituted by writing not holograph nor tested found to be good gular successors." But the case was too special to warrant its being stated . The dominant and servient tenement had originally belonged to the same o had sold the former, and two years after the sale sent a letter, which was aph or tested, to the purchaser, stating that he held himself bound not to s to obscure the light of the tenement sold, and that a clause to that effect omitted in the disposition. The Lord Ordinary held that such must have nplied condition of the sale. The report of this case in Mor. Synop. of Decis., 12, *voce* "Servitude," No. 6, bears that "the Court, as in the case of Gray, 14,513, held that a negative servitude can be ascertained by whatever affords hat it was contracted between the parties that such a servitude should exist." s not borne out by the report of the case in the Faculty Collection; while in f Gray the deed constituting the servitude was probative.

air, 2, 9, 4—Ersk., 3, 2, 2—Bell's Pr., § 1188—1 Bell on Leases, 282, note—on Land. and Ten., 347. (*z*) Stair, *supra*—Ersk., *supra*—Bell's Pr., nter, *supra*.

rvitude may be constituted by prescriptive use, or by written grant. In the f Cochrane *v.* Ewart, the question occurred, Whether it could also be con- *bus ipsis et factis?* There the adjoining feus of the pursuer and defender had to one proprietor. On that of the pursuer there was a tan-work, and the water e tan-yard was conveyed by a drain through the property afterwards acquired fender. When the property came to be held by different owners, the owner wer tenement built a wall intercepting the drain; and an action to have the n removed was raised by the owner of the higher tenement. The pursuer had ptive right. Lord Deas delivered the judgment of the Court. He held that claimed by the pursuers resolved into a right of servitude, which might be d,—(1) if it could be shewn that the water followed the natural declivity of d; (2) by implied grant; (3) *rebus ipsis et factis*, if the actings of the parties plied and recognised the existence of the right. He held that the right in was constituted both by implied grant and *rebus ipsis et factis*. His Lordship o the case of Preston's Trustees *v.* Preston, 1844, reported 22 D., 366, in which right of servitude had been held constituted *rebus ipsis et factis*. But when *v.* Ewart was appealed, Lord Chancellor Campbell and Lord Chelmsford re- view that a servitude might be constituted *rebus ipsis et factis;* and affirmed nent on the ground of implied grant, on the principle, that when a property ne owner was severed, and part of it was disponed, it was implied that any d and necessary for the comfortable enjoyment of the part disponed, was car- ie grant. This seems also the principle of the judgment of the case of Mutrie, *pra;* Cochrane *v.* Ewart, 1860, 22 D., 358; aff., 1861, 4 Macqueen, 117, and r., 435.

lease for more than one year has been entered into by v
ment, both parties have right to resile, and the contr
stand as a one-year's lease (*a*); because "its terms an
must have been adjusted at the commencement for
years, and would probably be quite unsuitable to a sho
and the allowing such an agreement to be binding
would be to convert one transaction into another" (*b*).
session has followed on such a lease, it will be good for
And if there has been possession for some years un
lease for more than one year, there is *locus penitentiae* a
but the year current (*d*), unless there has been *rei i*
considerable as not to be consistent with a lease for o
paying a grassum, erecting expensive buildings, and th

§ 549. When a tenant continues his possession afte
of the time stipulated in his written lease, he is presu
on the same terms as under that contract (*f*). But
lease, although important, is not conclusive proof of th
ment, and any change on its stipulations may be pro
jure (*g*); the possession for each successive year being u

(*a*) Stair, *supra*—Bell's Pr., *supra*—1 Bell on Leases, 281—1 Hunte
Ev., 221—2 Fraser on Pers. and Dom. Rel., 370—Cadell *v.* Sinclair, 1
noted in Hume D., 390, S. C. *Contra*, opinions in Paterson *v.* Edingto
De. and And., 147—Ersk. Prin., 2, 6, 8. (*b*) Tait, *supra*.

(*c*) Stair, 2, 9, 4—1 Hunter, 348—1 Bell on Leases, 282, note—
Keith *v.* Johnstone's Ten., 1636, M., 8400—A B, 1791, M., 15,181.
v. Johnstone's Ten., *supra*—Buchanan *v.* Baird, 1773, M., 8478—Hunte

(*e*) A B, 1553, M., 8410; 15,209, S. C.—Skene *v.* ——, 1637, M.,
v. M'Whirter, 18th December 1810, F. C.—See Neill *v.* Cassilis, 22d N
—More's Notes, 67. See on this point *infra* in the chapter on *rei interve*
tit. 1, ch. 4. (*f*) 1 Hunter, 519. (*g*) *Supra*, § 173.
Duff, 1851, 13 D., 1044, *supra*, § 113. Where a change is agreed to
stipulations of a previous written lease, the tenant rather possesses unde
than on tacit relocation.

[2] A verbal lease for more than one year is binding if followed by
but the verbal lease, though followed by *rei interventus*, cannot be prove
but only by writ or oath of party. "When the institutional writers or o
speak of a verbal agreement not being binding even if it were admitted
always mean a verbal agreement upon which there has been no *rei inter*
the other hand, when they speak, in other passages, of a verbal agreeme
ing if *rei interventus* has followed upon it, they always mean a verbal ag
tently proved, that is to say, proved by the adversary's oath"; Lord De
Carstairs, 1862, 24 D., 1382. But it may be proved also by his writ;
stairs (where the question was as to a lease for 999 years), and Walke
25 D., 417, where the question was as to an alleged lease for 3 years.
note [11].

contract, which adopted all the obligations under the prior
xcept in so far as they were specially departed from.

50. The rule which requires writing in obligations regarding
ge applies to submissions; no contract of submission or de-
bitral of which that is the subject being effectual, unless it
ained in a probative or holograph writing (*h*), or unless it has
llowed by *rei interventus* (*i*).

51. But while either party may resile from a verbal obliga-
garding heritage so long as matters are entire, yet if the party
ides by the contract has incurred expense on the faith of
nance, he will be entitled to reparation for these expenses
he party resiling. Thus where the subscribers for a monu-
to the late Lord Melville had agreed verbally with Sir Peter
r for a site for the building, and had performed several opera-
n the ground; and where, in consequence of the agreement,
l altered his feuing plans, and the drains and levels on his
l; but the monument had afterwards been erected on another
n an action at the instance of Sir Peter, the Court held him
d to "indemnification for any actual loss he might have sus-
, and for the expenses incurred in consequence of the altera-
f the site" (*k*). So where a party alleged that he had expended
of money in erecting a dwelling house on a piece of ground
he knowledge of the proprietor, and on the faith of his verbal
se to execute a conveyance, but that the ground had subse-
ly been conveyed to a third party, the Court held that an
for the expenses which the party had so laid out was relevant,
at the rule which required the intervention of writing in ob-
ns regarding heritage did not apply (*l*). The case was re-
d as laid on fraud, and the promise as well as the expenditure
put in issue; from which it would seem that parole was con-
d admissible to prove them both. In this case, however, as
s that regarding Lord Melville's monument, the action was
ned only for the actual expenses incurred in consequence of
greement not having been implemented, and not generally for
mage occasioned by non-implement.

A B, 1584, M., 12,448—A B, 1617, M., 16,829—Gairdner *v.* Brown, 1738, M.,
Tait, Ev., 223. (*i*) See on *rei interventus*, *infra*, Part ii, b. i, tit. 1, ch. 4.
Walker *v.* Milne, 1823, 2 S., 379. The summons concluded for implement or
es, but the first alternative was departed from. See also Mackenzie *v.* Trotter,
M., 8437—Campbell *v.* Robertson, 1797, noted in Hume D., 849.
Bell *v.* Bell, 1841, 3 D., 1201.

§ 552. In an old case, where parties had agreed to lease for several years under the stipulation that if the te not enter he was to pay a year's rent as penalty or fo landlord having erected farm buildings, and the tenant h fused to enter; the Court sustained the claim of the form penalty; which, being due under an obligation to pay m certain event, did not require writ for its constitution, but proved by the oath of the obligant (*m*). The principle of seems to apply to all verbal obligations regarding heritage penalty is stipulated in the event of non-performance.

§ 553. It was once held that a verbal promise to rati formal disposition of land was binding, and could be prove oath of the obligant (*n*).

The rules as to *rei interventus* are considered afterward

CHAPTER III.—OF THE PROOF OF RIGHTS AND OBLIGAT REGARDING MOVEABLES.

I. *Proof of property in Moveables.*

§ 554. It has already been seen that the possession of c moveables raises a presumption of a right of property in th that this presumption may be overcome by proof *prout de j*

II. *Nominate Contracts regarding Moveables.*

§ 555. Contracts and obligations which relate to corpore ables, and have known prestations, may be proved *prout* whatever be the amount at stake (*b*). The reason is, tha heads of such agreements are simple and easily remembe as law will supply the consequent mutual obligations, the pr safely be by parole, and the interests of trade require that i not be unnecessarily restricted. This rule applies to cont sale, barter, and location of corporeal moveables (*c*). The

(*m*) Skeen *v.* ——, 1637, M., 8401—Stair, 2, 9, 4—Ersk., 2, 6, 30—Tait'

(*n*) Christie's Daughters *v.* Christie, 1745, M., 8437. This decision is que Professor More, Notes to Stair, p. 66.

(*a*) *Supra*, § 327, *et seq.*

(*b*) Stair, 4, 43, 4—Ersk., 4, 2, 20—Bell's Pr., §§ 89, 136, 196, 204—Tait,

(*c*) Authorities in preceding note.

tion in regard to ships; for the sale or transference of which g is required both by common law (*d*), and by the terms of egistry Acts (*e*).[1] This solemnity is also necessary in con- of affreightment, by which the whole or a large part of a ship ted (*f*). But a contract to carry goods in a ship may be tuted verbally, and may be proved *prout de jure* (*g*).

the cases above noticed, where writing is necessary, it is bind- though not probative or holograph, being *in re mercatoria* (*h*).

56. When a contract concerning moveables stands on offer ceptance, the most satisfactory proof is where writing has in- ed on both sides. But a written offer may be accepted ver- (*i*), or by acting in terms of it, *e.g.*, sending the goods which rty offered to buy (*k*). Even tacit acceptance is binding, as a merchant writes to his correspondent that he will send him commodities at a specified price unless he hears from him contrary, and the merchant to whom the offer is made does cline it within a reasonable time (*l*). But whenever the offer expressly or by implication requires a written acceptance, essential to the constitution of the contract.[2]

57. Writing seems to be essential to the transmission of in- eal rights, although relating only to moveables. Thus the yance of a written obligation to deliver grain at a certain cannot be proved by witnesses (*m*). And writing is essential gnations of written obligations (*n*); and even to the assigna-

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1 Bell's Com., 153. (*e*) 3 and 4 Will. IV, c. 55—8 and 9 Vict., c. 89—13 Vict., c. 29, §§ 7, 20. See chapter on the registry of ships, *infra*, Part ii, b. ii, . 7. (*f*) 1 Bell's Com., 539. (*g* Bell's Com., *supra*. Bell's Com., *supra*. See *infra*, § 784, *et seq.*, upon writings *in re mercatoria*. Bell's Com., 326. (*k*) Bell's Com., ib.—Bell's Pr., § 76—Mackellar *v.* t, 1828, 4 Mur., 544. (*l*) Bell's Com., ib.—Bell's Pr., ib.—Jacques Serruys Watt, 12th Feb. 1817, F. C.—Jaffray *v.* Boag, 1824, 3 S., 375. (*m*) Clark nder, 9th March 1819, F. C.; 2 Mur., 89; affirmed 19th June 1819, 6 Pat. Ap. Ca., See copy of Lord Chancellor's speech in Session papers in the Advocates' Li- ac. Col., 9th March 1819. (*n*) 1 Bell's Com., 328.

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e as to title in ships, Duffus *v.* Mackay, 1857, 19 D., 430—Schultze *v.* Robin- 1, 24 D., 120—Bell *v.* Gow, 1862, 1 Macph., 183.

a written lease it was provided that the landlord or incoming tenant should e option of taking, at a valuation, the half or whole of the way-going crop, on on to the out-going tenant, six months before the expiry of the lease. The eld that a verbal intimation by the incoming tenant of his intention to take the ng crop had been competently proved by parole. Lord Deas thought that the on should have been in writing; Duke *v.* Ferguson, 1862, 24 D., 547.

tion of a debt which may be constituted without that form So, in an old case where two parties verbally excambed th in two public companies, and earnest was given thereon, held that, as writing had not been interposed, there was *tentiae*, upon the party who resiled returning the earnest ing the damages which he had occasioned to the other pa adhering to the bargain (*p*).

§ 558. Assignations to grants of patent must be i They must be entered in the "Register of Proprietors;" such entry shall have been made, the grantee or grant letters patent shall be deemed and taken to be the sole a sive proprietor or proprietors of such letters patent," and lative rights and privileges (*r*). In like manner copyrig be effectually assigned except by written assignment ente Register Book of the Stationer's Company (*s*).[4]

§ 559. Writing is not essential to submissions regard ables; both verbal submissions and verbal decrees-arbitr matters being valid, if proved by oath of party on ref Strictly they may not be proved by witnesses, or even biters examined on oath (*u*). But "there may be partic

(*o*) Bell's Pr., § 1460—Smith *v.* Puller, 1820, 2 Mur., 344—Isles *v.* Gi 380, note—Forbes *v.* Alison, 1823, 2 S., 169. *Contra*, Pampin *v.* Melville Sup., 506. (*p*) Lawson *v.* Auchinleck, 1699, M., 8402. Vict., c. 83, § 35—Norman's Law of Patents, p. 147. (*s*) 5 and § 13. (*t*) Wishart *v.* Falconer, 1625, M., 17,013—Home *v.* Sc 8402—Fraser *v.* Williamson, 1773, M., 8476; 12,417, S. C. (*u*) Fe 1824, 3 S., 75 (new ed.)—Fraser *v.* Williamson, *supra*. But in Home *v.* the Court allowed the decree to be proved by the arbiter's oath.

[3] The act 25 and 26 Vict., c. 85, gives certain abridged forms by whic may be conveyed, moveable rights assigned, and the assignations intimate

[4] A certificate of registration in the Register Book is *prima facie* eviden ship of copyright. In a recent case, the registered proprietor of the copyri raised an action against a party who had published the song; and at t which ensued (the verdict being for the pursuer), an exception was charge of the presiding judge, Lord President M'Neill, in so far as he la "in the event of *prima facie* evidence being rebutted, the pursuer, the r prietor, might still support his title, without production of a formal instrum ment, attested by two witnesses." This direction was held by the Cou founded, and the judgment was affirmed on appeal. It was not decided dence the title of the pursuer could have been supported, if the *prima f* ferred by the registration had been held to be rebutted. The pursuer p *alia*, a written receipt by the authoress for the price. The Court refuse the verdict, as against evidence. But no objection to the competency of cept so far as covered by the exception to the direction, was insisted i Kyle, 1856, 18 D., 906; aff. 1859, 31 Sc. Jur., 566.

l transactions where probably the Court might allow a sub- and a decree to be proved by parole" (*x*). And this has lowed in submissions *inter rusticos* regarding matters of nportance (*y*).

ere the contract to submit or the decree-arbitral requires to riting, the document must be either holograph or proba- If it is not, it may be validated by *rei interventus* (*a*).

0. A judicial reference, even when agreed to in writing, is ncluded contract till the authority of the Court has been ned to it; and therefore either party may resile, if he can he Court that the proceeding is inexpedient (*b*). It has not ttled whether the power to resile exists independently of rt.

1. Transaction or compromise regarding moveables may be by writ or oath of party, but not by parole (*c*), except in matters (*d*). *Rei interventus* will probably open the door of at large. In a keenly contested case where the issues Whether, under an arrangement of a certain case during a was meant that a sum which a friend of one of the parties m bound to pay was by way of obligation, or only as a chari- nation? and, Whether the arrangement had been sanctioned party (who afterwards attempted to disturb it)?—parole evi- vas admitted along with the writings which passed on the n; and Lord Moncrieff charged the jury that "the question r any agreement entered into was a compromise or not, de- n the whole evidence, written and parole, taken together." ject of admitting parole was to show the true meaning of ters, as contrasted with certain expressions contained in).

III.—*Innominate Contracts regarding moveables.*

2. Mr Erskine holds that contracts which are not distin- l by proper *nomina juris*, and which consist of mere recipro-

er Lord Glenlee in Ferrie *v.* Ewing, *supra.* (*y*) A B, 1746, M., 8475 o Gibson *v.* Howie, 1629, M., 16,879. (*x*) See Part ii, b. i, tit. 1, ch. 1, on ntication of writings in submissions. (*a*) See Part ii, b. i, tit. 1, ch. 1, *erventus.* (*b*) Reid *v.* Henderson, 1841, 3 D., 1102. (*c*) Cranstoun 1533, M., 12,297—L. Somerville *v.* N., 1540, M., ib.—Fotheringham *v.* Hun- , M., 12,414. See also M'Ilhose *v.* Reid, 1744, M., 12,389—Cadzow *v.* Wilson, Mur., 101—Burnett *v.* Ewen, 1680, M., 16,494. (*d*) Tait, 303. affray *v.* Simpson, 1835, 13 S., 1122.

cal obligations to give or perform, cannot be proved by when the subject is beyond £100 Scots; "because, whil tracts which lay mutual obligations on both parties, natu ing from the contracts themselves, their meaning can misapprehended by witnesses," "in verbal agreements in articles do not necessarily arise from the nature of any k tract, but depend entirely upon the import of the words the parties, inattentive hearers may, either by misplacing spoken, or by mistaking its true meaning, be apt to c obligation into something quite different from what the tended" (*f*). This view is supported by the opinion of boddo in his report of a case of cautionry, which, howeve decided on that ground (*g*). Mr Tait (*h*) adopts the sam though acknowledging that it has not been recognised by sion. It does not appear to have been adopted in pra the contrary, the tendency of several decisions is a rule (*i*). It is not likely, therefore, that it will be f modern practice, especially as the admissibility of the witnesses has removed the chief ground on which M maintained his doctrine.[5]

(*f*) Ersk., 4, 2, 20. (*g*) Tassie *v.* M'Linloch, 1764, 5 B. S
(*h*) Tait, Ev., 304. (*i*) See Stirling *v.* M'Phadrick, 1628, Wilson *v.* Swan, 1804, Hume D., 817—Borthwick *v.* Bremner, 1833, 11 S. *v.* Hill, 1830, 8 S., 833—Same parties, 10 S., 219.

[5] The law seems to be correctly stated in the quotation from Erskine. of Edmonston *v.* Edmonston, Lord Benholme, delivering the judgment adopted the law as there laid down; and added,—"It is clearly the law not only in regard to heritage, but also in regard to moveables, that inn tracts, especially such as are of an unusual character, cannot be constitute proved by witnesses. Nor does it alter the rule that *rei interventus* upon su innominate contracts is alleged. For the uncertainty as to the terms of a verbal contract renders it impossible to determine what acts can be consid stituting a partial performance, or *rei interventus* following upon it." In th monston, the pursuer set forth an agreement to the effect that he was to s estate if he settled in a certain neighbourhood as a medical practitioner, that he had accordingly done so, abandoning his previous mercantile purs held that the agreement could not be proved by parole; Edmonston *v.* Bru ston, 1861, 23 D., 995.

PTER IV.—PROOF OF CONTRACTS OF PARTNERSHIP AND JOINT ADVENTURE.

563. The contracts of partnership and joint adventure may ablished by evidence *prout de jure* (*a*).

CHAPTER V.—PROOF OF CONTRACTS OF SERVICE.

564. A contract of service for a period not exceeding a year e proved *prout de jure* (*b*). Writing is essential to the con- ion of contracts for any longer period (*c*); neither parole (*d*) th of party (*e*) being admissible to prove them, unless there een *rei interventus*. A verbal contract for more than a year t be enforced even for that period; because its stipulations made with reference to a contract essentially different (*f*). the service has been entered upon, such a contract is effec- or the year current; each party being entitled to resile at the f that term (*g*). And a verbal contract for more than one which has been followed by such *rei interventus* as is incon- t with only one year's duration, will be effectual for the whole l (*h*). It was once held that a contract of service entered into l for more than one year, and followed by entering into the e, had been effectually constituted for its whole term, accord- the *lex loci contractus*, and might be proved by parole (*i*).

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2 Bell's Com., 622—Bell's Pr., § 364—Tait's Ev., 299—Stevenson *v.* Wright, I., 12,732—Logan *v.* Brown, 1824, 3 S., 15—Thomson *v.* Campbell's Tr., 1831, ., 16—M'Kinlay *v.* Gillon, 1831, 9 S., 90; affirmed 5 W. S., 468.

Ersk., 1, 7, 62, note—Bell's Pr., § 173—2 Fraser, Pers. and Dom. Rel., 369— v., 298. (*c*) Ersk., *supra*—Bell's Pr., *supra*—2 Fraser, 370—Tait, *supra*— ly *v.* Young, 1837, 1 Swin., 474—Caddell *v.* Sinclair, 1749, M., 12,416; S. C., Iume D., 390—Paterson *v.* Edington, 17th June 1830, F. C.; 8 S., 931; 3 De. d., 147, S. C. (*d*) Kennedy *v.* Young, *supra*. (*e*) Caddell *v.* r, *supra*—Tait, 299. (*f*) Paterson *v.* Edington, *supra*. (*g*) Caddell air, *supra*—Tait, *supra*—Fraser, *supra*. (*h*) See Napier *v.* Dick, 1805, D., 388—Rymer *v.* M'Intyre, 1781, M., 5726; Hailes, 887, S. C.—Neil *v.* , 1807, Hume D, 20. See the chapter on *rei interventus*, Part ii, b. i, tit. 1, ch. 4. Gale *v.* Dumbarton Glass Co., 1829, 7 S., 369.

§ 565. Where a party sues another for wages as ha earned under a contract of service, he may prove *prout de* the fact of service and the terms on which it was ren cause such a case does not involve any question of *locus* but only the questions, Was there service? and if so, U terms (*k*)?

§ 566. When writing is required to prove a contract it must be probative or holograph; and an informal mis out *rei interventus* cannot be set up even by oath of party

The rules as to the effect of *rei interventus* in validatin contracts of service are considered afterwards.

CHAPTER VI.—PROOF OF CONTRACTS OF MANDAT

§ 567. Contracts of mandate may generally be pro role, and always by writ or oath (*a*). All these modes o competent in mandates to enter into such contracts regard ables as may be proved *prout de jure* (*b*). Writing is n sential to the constitution of a mandate to buy herita where one had bought an estate, another person allegin purchase had been made for him under a verbal ma prove his averment *prout de jure* (*c*). And where the

(*k*) Thus one who had taken charge of her brother's children for eight lowed to prove *prout de jure* an agreement that she was to be remunerate Gillespie, 1833, 12 S., 125; 13 S., 700. And such an agreement has been the fact of service performed by one living in the house of a relation, th proof that it was to be gratuitous; Anderson *v.* Halley, 1847, 9 D., 1222; *su* —Shepherd *v.* Meldrum, 1812, Hume D., 394—M'Naughton *v.* M'Na Hume D., 396—Adams *v.* Peters, 1842, 4 D., 599. Whereas when serv rendered by a neighbour not living in the house, the Court rejected a clai maintained on the ground of implied obligation; Ritchie *v.* Ferguson, 184

(*l*) Paterson *v.* Edington, *supra*—Caddell *v.* Sinclair, *supra*—2 Fraser 373. (*a*) 1 Bell's Com., 478—More's Notes, 73—Tait Ev., 2 M'Lean, 1833, 11 S., 733—Cases in Mor., 12,397, *et seq.* In the older case was often required. See B. Synop., 1896. (*b*) Authorities in prec

(*c*) Boswell *v.* Selkrig, 1811, Hume D., 350—Corbet *v.* Douglas, 18 Tweedie *v.* Loch, 5 B. Sup., 630—Skene *v.* Balfour Ramsay, ib.—Maxwel ib.—per L. Glenlee in Mackay *v.* Ambrose, 1829, 7 S., 699—per Lord Pr in M'Lean *v.* Richardson, 1834, 12 S., 869—Alison *v.* Alison, 1771, M., Sup., 630, S. C. These cases are noted fully, *infra*, § 576 (*h*).

of a party maintained that a mandate to buy houses for him only be proved by writ or oath, the Court admitted parole of inferring that he had homologated the purchase (*d*).[1]

568. Mandates to draw, accept, or indorse bills, may be proved e writ or oath of the mandant (*e*). The old rule of Scotch law red a written procuration (*f*). But it is now settled that such ates may be inferred from facts and circumstances (*g*); *e.g.*, the al practice of the principal to recognise the mandatory's sub-ions (*h*), or his recognition of the individual bill (*i*). So a who has recognised a bill to which his name was affixed by a person, is barred from alleging that it was forged, the recog-implying authority (*k*). Procuration is also embraced by eneral authority of the agent or factor of a merchant residing d (*l*). So the averment that it was the custom for commission s in a certain trade to draw bills on their principals per pro-ion without a special mandate, and that this was known to a n engaged in that trade, was held relevant to warrant an issue ocuration, so as to make him liable for the amount (*m*).[2] And ower of the general manager of a company's business at a place e neither of the partners resided, coupled with some other cir-tances, was held to make the company liable for a bill drawn

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Mudie *v.* Ouchterlony, 1766, M., 12,403; Hailes, 15; 120, S. C.
1 Bell's Com., 399—Bell's Pr., § 321—Thomson on Bills, 220. (*f*) Ib.
Bell's Com., ib.—Bell's Pr., ib.—Thomson, ib.—Davidson *v.* Robertson, 1815, 3
18, reversing. (*h*) Bell's Com., *supra*—Bell's Pr., *supra*. (*i*) Bell's
upra—Chitty on Bills, 31, *et seq.*—Byles on Bills, 23—Llewellyn *v.* Winckworth,
3 Me. and Wel., 598—Cash *v.* Taylor, 1830, Lloyd and Welsby, 178—Prescott
n, 1832, 9 Bing., 19. See also Provan *v.* Gray, 1821, 1 S., 92—Finlay *v.* Currie,
3 D., 278. (*k*) Miller *v.* Little, 1831, 9 S., 328—Maiklem *v.* Walker,
2 S., 53—Reg. *v.* Parish, 1837, 8 Car. and Pa., 94—Barber *v.* Gingell, 1800,
60. (*l*) 1 Bell's Com., 400. (*m*) Anderson *v.* Buck, 1841, 3
.

Stewart *v.* Johnston, 1857, 19 D., 1071, Lord Ardmillan, Ordinary, held that ment of verbal authority to contract for a feu of heritable subjects cannot be ently proved by parole. But Lord Deas, in the Inner House, said that he was be understood as assenting to that doctrine.

s competent to prove by parole a mandate to make a donation; Mackenzie *v.* 1859, 21 D., 1048.

nplied authority to accept a bill per procuration for another may arise in three -(1) the party signing per procuration may hold an office which of necessity im-ch authority; (2) the authority may be implied from the practice of a particular or (3) it may be inferred from a previous course of dealings between the parties. master has no authority to bind the owners in a bill deb London Joint Stock . A. Stewart & Co., 1859, 21 D., 1327.

by the manager as per procuration (*n*). The Court, howe
to inferring procuration from isolated acts of persons no
Accordingly, where a person appearing as acceptor of a b
that her name had been put to it by her daughter with
rity, the Court, being "satisfied that she was not in tra
use to accept bills, that her daughter never accepted for
out special authority, which she had done only about six
the course of her life," suspended diligence on the bil
England procuration may also be established by parole
authority (*p*). But it has been doubted whether the p
unlimited in this country (*r*).

§ 569. The possession by a factor of a promissory-n
for the purpose of drawing the interest, which he had rec
discharged for several years with the creditor's authority
infer a mandate to discharge the principal debt (*s*). Thi
however, does not impugn the principle that authority
and discharge a debt may be proved by such facts an
stances as fairly bear that inference (*t*). Mr Tait holds
mandates, and mandates to pay money in order to const
gations, although proveable in this way, cannot be ma
parole of verbal authority (*u*), on account of the risk o
nesses mistaking the purpose of the payment, and of th
practice to employ writing in such cases. This is probal
as a general rule. But it will not hold where a party sell
ables on verbal bargain authorises the buyer to pay the
certain person; for such a mandate is part of a contract
by parole. Where money is admitted to have been pa
creditor by a third party, it would rather seem that par
missible to show that it was paid by the debtor's orde
meant to be applied to a certain obligation (*w*). Mere
by an agent of a deposit-receipt in favour of his client, wh
indorsed it, does not imply authority to the agent to
principal (*x*).[3]

(*n*) Turnbull *v.* M'Kie, 1822, 1 S., 353. (*o*) Lowson *v.* Matthe
502. (*p*) A B, 12 Mod., 564, per Holt—Porthouse *v.* Parker, 1807,
(*r*) Thomson on Bills, 221. (*s*) Duncan *v.* Clyde Trustees,
519; affirmed 1853, 25 Sc. Jur., 331. (*t*) Tait Ev., 300, 302—Sand
aldson, 1830, 9 S., 74. (*u*) Tait, *supra*. But see Arbuthnot *v.* Sco
Sup., 910. (*w*) See Foggo *v.* Hill, 1840, 2 D., 1322. (*x*)
v. Western Bank, 1854, 16 D., 807.

[3] See Stewart *v.* Central Bank of Scotland, 1859, 21 D., 1180.

570. An advocate appearing in Court is presumed to have a ate from his client; or, as the rule is usually expressed, "an ate's gown is his mandate (*y*)." But this presumption may be ome; as a probative written mandate may be shown to be a ry (*z*).[4]

571. A mandate to an agent to conduct law proceedings may oved by the client's writ or oath. It will also be presumed the agent's possession of the client's titles relating to the er in issue, or of a service copy of the summons which the was employed to defend (*a*). And it will be inferred from of homologation or recognition by the client of the agency; *e.g.*, aving held meetings with the agent about the business (*b*); g signed pleadings prepared by the agent in his name (*c*); g conversed with the agent about the case, and carried away process for inspection, when it embraced papers lodged for (*d*); and the like. So transmitting a bill to an agent presumes ndate to him to raise diligence upon it (*e*). Where a law- t admitted that he was employed by a client to protest a bill, o raise diligence on it against the debtor, which he did accord- ; but where he denied that he was instructed to carry the ence into execution; it was held competent for the client to *prout de jure* his instructions to take that step (*f*).[5]

CHAPTER VII.—PROOF OF TRUST.

572. Trust may be constituted by a writing which both vests

) Stair, 1, 12, 12—Ersk., 3, 3, 33—Mor., *voce* Advocate. (*z*) Hamilton *v.* all, *infra*—Cowan *v.* Farnie, 1836, 14 S., 634. (*a*) Act of Sederunt, 10th 1839, § 30—Hamilton *v.* Marshall, 25th November 1813, F. C.—Muir *v.* Steven- 850, 12 D., 512. (*b*) Bryan *v.* Murdoch, 1824, 3 S., 282.

) Campbell *v.* Gray, 1821, 1 S., 37. (*d*) Grant *v.* Wishart, 1845, 7 D., 274 llace *v.* Miller, 1821, 1 S., 40—Gordon *v.* Sinclair, 1826, 4 S., 708.

) Macdonald *v.* Kelly, 1821, 1 S., 101. (*f*) Highgate *v.* Boyle, 1819, D., 356.

But a party who had been represented by counsel, in a process in which decree had out against him, was not allowed to suspend diligence on the decree, on the alle- that he had not authorised the appearance made for him in the cause. It was re- ed from the bench that the party might perhaps reduce the decree; Young *v.* List, 24 D., 587.

Cormie *v.* Gregor, 1862, 24 D., 985, 9.

the trustee and contains the conditions of the trust,—by a
deed qualified by a written declaration of trust,—by su
with a verbal obligation as to its fiduciary character,—
writing is not required for vesting the trustee, by a verba
of the subject, qualified by a written or verbal obligati
minister it for the trust purposes.

§ 573. There is, of course, no difficulty as to the p
trust, where its conditions are embodied in a writing; the
being the best, and the only competent proof of them. V
right as standing on the deeds is absolute, the obligation
trust may be proved by the writ or oath of the trustee
cording to the older decisions these were the only compet
of proving that an absolute deed was qualified by a trust
towards the middle of the seventeenth century the Court
proof by facts and circumstances, and even by parole (
loose practice was remedied by the act 1696, c. 25; w
regulates the mode of proving trusts.

§ 574. This statute proceeds on the preamble that th
ing of persons without a declaration or backbond of trust i
was an occasion of fraud, and of many pleas and contenti
it enacts, "that no action of declarator of trust shall be
as to any deed of trust made for hereafter, except upon a d
or backbond of trust lawfully subscribed by the person
be the trustee, and against whom, or his heirs or assignee
clarator shall be intented, or unless the same be referr
oath of party *simpliciter;* declaring that this act shall n
to the indorsation of bills of exchange, or the notes of an
company."[1]

§ 575. This act applies to trusts regarding moveable
heritable property (*d*). But where the right in a movea
is not constituted by writing, witnesses are admissible to p
it is held in trust (*e*). The common application of the act

(*a*) Act 1696, c. 25—Stair, 1, 12, 17—Ersk., 3, 1, 32—1 Bell's Com., 33
§ 1994. (*b*) Per Lord Braxfield in Stewart *v.* Bannatyne, 1777, F
Forsyth on Tr., 54. (*c*) Stair, *supra*—Ersk., *supra*—Cases in Br. Sy
—Wright *v.* Ker, 1631, M., 12,703. (*d*) See Knox *v.* Martin, 1856
—Montgomery, 7th February 1811, F. C.—More's Notes, 74. (
naver *v.* M'Beath, 1731, M., 12,757—More, *supra*—Forsyth on Trusts, 54.

[1] Where a party suspended a charge on a decree on an allegation of tru
tion was raised Whether trust could be proved in a suspension, or whether
was necessary? Lord Cowan thought it might be proved in a suspension, b
brought a declarator; Cullen *v.* Anstruther, 1856, 18 D., 592.

rustee's right flows directly from the truster. It is also appli- where the right is derived from a third party by the truster's e; *e.g.*, where a party selling an estate grants an absolute dis- ion to a person, who is truly trustee for the purchaser (*f*).

576. But where the trust arises not from the act or consent e truster, but from the act of the trustee,—*e.g.*, his spontaneous ference as a *negotiorum gestor*,—the trust may be proved by e (*g*). Nor is the proof limited to writ or oath where the party ing the beneficial right alleges that the disponee under a deed *acie* absolute had been employed by him to purchase the pro- , and had wrongfully taken the titles in his own name; be- e that is truly an averment of a purchase for the employer r a mandate, and of a fraudulent attempt to defeat the pur- er's right; whereas it is essential to a trust that the party d with the subject should have acquired it by the consent of truster in order to fulfil the trust purposes (*h*). On the other , the averment that the mandatory had been empowered to the titles in his own name for behoof of his employer involves per case of trust, and can only be proved by the trustee's writ th (*i*).

) Duggan *v.* Wight, 1797, M., 12,761; affd., M., 12,767—1 Bell's Com., 33.

) Spruel *v.* Crawford, 1741, M., 16,201[2]—1 Bell's Com., 33.

) In Tweedie *v.* Loch (no date), 5 B. Sup., 630, and Skene *v.* Balfour Ramsay, ib., f before answer was allowed of such an averment. In Maxwell *v.* Maxwell, ib., ourt allowed a "proof," and in Corbet *v.* Douglas, 1808, Hume D., 346, a proof *de jure*. The rule in the text is well stated by Lord Glenlee in Mackay *v.* Ambrose, 7 S., 699, and by Baron Hume in his report of Boswell *v.* Selkrig, 1811, Hume 0, where a proof by facts and circumstances was admitted. See also Mudie *v.* erlony, 1766, M., 12,403; Hailes, 15 S. C.

ofessor Bell in his Principles, § 1994, (1), founding on Alison *v.* Alison, 1771, M.,); 5 B. Sup., 630, S. C.—Duggan *v.* Wight, 1797, M., 12,761; affd., M., 12,767— lackay *v.* Ambrose, *supra*, lays down that the rule stated in the text was abandoned, at the statutory proof is now required in the cases referred to. But the learned sor's view is not supported by the authorities which he cites. In Alison *v.* Alison, orted by Mr Tait (5 B. Sup., 630), it was mutually agreed that the title should be in the name of the person who had been employed to make the purchase; the being to defraud the creditors of the real purchaser, and a proof by "facts and nstances" was allowed. In Duggan *v.* Wight, where proof by writ or oath was ecessary, the real purchaser was a Roman Catholic, and disqualified from possess- eritage; and it was agreed that the title should be taken for his behoof in name agent. And in the case of Mackay *v.* Ambrose, the facts were of nearly the same cter. (*i*) Duggan *v.* Wight, *supra*—Mackay *v.* Ambrose, *supra*—Boswell *v.* ig, *supra*, Hume D., 350.

See the case of Spreul *v.* Crawford, *supra*, explained in Marshall *v.* Lyell, 1859, , 514.

§ 577. An averment that money deposited in bank one of the partners of a company really belonged to t held to come under the rules of partnership, not of t be proveable *prout de jure* (*k*). And writ or oath was be the only mode of proving that payment of a bill t partners of a company had been made for the general b

§ 578. The question has been raised, whether th applies to cases between the trustee and third parties cases where the truster or those in his right insist agai tee. If a case involves fraud or conspiracy to defeat th of the third party, there seems to be no doubt that pro *jure* is admissible to establish the latent right. This i trated in actions to set aside fraudulent conveyances by to conjunct and confident persons (*m*). So where the p the life-interest of an heir of entail granted to his bro of the entailed lands; and where a sub-lease at a large rent was contracted immediately afterwards; it was hel to prove *prout de jure* that the first lease was truly in t benefit of the lessor, in order that he might draw the after the death of the heir of entail (*n*). On the same was held competent for freeholders objecting to a cla ment to prove *prout de jure* that the claimant's alleged was confidential and nominal (*o*). And where a wido that funds in bank in name of his wife's sister had tru to his wife, the Court allowed a proof before answer, opinion that, the averment being of a conspiracy betw and her mother and sister to defeat the husband's *jus* act 1696 did not apply (*p*).

§ 579. The rule has sometimes been laid down b apart from considerations of fraud, a third party interes ing a trust is not limited to the trustee's writ or oath; never had an opportunity of securing proof by the tr and he ought not to be shut up to proof by the oath of o

(*k*) Baptist Churches *v.* Taylor, 1841, 3 D., 1030. See also Kilpatric 1841, 4 D., 109. (*l*) Jackson *v.* Munro, 1714, M., 16,197. Th tions that the decision went on the exception of bills and notes at the But that is probably a mistake, as the exception only applies to *indors* this case Tait, 310, and More, 74. (*m*) 2 Bell's Com., 192.

(*n*) L. Elibank *v.* Hamilton, 1827, 6 S., 69. (*o*) Ferrier *v.* M M., 8772. But the party who granted the title can only prove by the or oath that it was in trust; Douglas *v.* Dalrymple, 1770, 2 Pat. Ap. Ca.,

(*p*) Harper *v.* Hume, 16th July 1850, 22 Sc. Jur., 577. See also § 5

ur or veracity he had not trusted (*r*). The point, however, not been decided; and it would seem that a proof *prout de jure* ich cases is inconsistent with the terms of the statute (*s*).[3]

580. A person may prove *prout de jure* that an absolute right s favour is truly a trust (*t*).

581. With regard to the writs by which trust may be proved, holograph or probative writing signed by the trustee, which y implies a trust, will suffice, although it is neither a formal nor an express admission of trust (*u*). Thus where a disposi- *ex facie* absolute was alleged to be a trust for the disponee and her, the disponee's letters importing a trust, with a deed signed hem both, in which they were described as "joint proprietors" e subject, bills for the price, and receipts for rents in their joint es signed by the *ex facie* absolute proprietor, and some other inicles, were held sufficient (*x*). And a declaration of trust in ranger's handwriting, followed by the words "I agree to the e," which were holograph of the disponee and signed by him, fficient (*y*). A trust has also been held proved by accounts uetted by the trustee along with parole evidence (*z*).

582. In one case it was even found that although the writ aring the trust is not holograph or tested, yet if the signature is genuine, the requisite of the act is complied with, the de- ation being "lawfully subscribed" by the trustee (*a*). In an- r case it was observed by Lord Cringletie that a letter merely ed by the trustee is enough, if he acknowledges the subscrip- (*b*). This view seems to be well founded, according to the prin-

) Per L. President Hope in Scott *v.* Miller, 1832, 11 S., 26—*per curiam* in Lord nk *v.* Hamilton, 1827, 6 S., 69—Tait on Ev., 311. (*s*) In support of this see Elch. Notes to Stair, p. 75—per Lords Balgray and Gillies in Scott *v.* Miller, —Forsyth on Trusts, 62. (*t*) Murdoch *v.* Wyllie, 1832, 10 S., 445.

) See Stirling *v.* Stirling, 1822, 1 S. (new ed.), 501—Wood, Small, & Co. *v.* Spence, 12 S., 42—Ramsay *v.* Butchers of Perth, 1748, M., 12,757—Montgomery's Ex., 'ebruary 1811, F. C. (*x*) Macfarlane *v.* Fisher, 1837, 15 S., 978.

) Bryson *v.* Crawford, 1833, 12 S., 39. (*z*) Stewart *v.* Bannatyne, 1777, s, 762; 5 B. Sup., 631, S. C. (*a*) Bryson *v.* Crawford, *supra.*

) Mackay *v.* Ambrose, 1829, as in 1 De. and And., 125.

Where the acceptor of a bill, in a suspension of a charge by the holder, alleged the holder was trustee for a third party, and that that party had discharged the ac- r of his obligations under the bill; it was held that the act did not apply, because uestion was not "between a truster, or one in his right, and a trustee or one in his , but between an alleged trustee and a third party," who had been a debtor of the er; and the Court accordingly allowed a proof; Middleton *v.* Rutherglen, 1861, 23 26.

ciple of *rei interventus*; because the absolute right was gi
the footing of the trustee obliging himself to divest; an
matters are not entire, so as to entitle him to resile fr
probative deed (*c*).

§ 583. According to the statute, the writ must be
by the trustee (*d*).[4]

§ 584. Trust may also be proved or inferred from th
admissions on record; which, according to Scotch rule
ing, are conclusive against the party who makes them (*e*

§ 585. Although evidence *prout de jure* is inadm
proving a trust, yet if a trust to some effect has been
writ or oath, or by admissions of the trustee on record,
will allow its conditions to be expiscated by the truste
examination (*f*), by facts and circumstances (*g*), and eve
evidence (*h*).[5]

(*c*) See Rutherfords *v.* Rutherford's Tr., 1808, Hume D., 919—Bu
chanan, 1775, M., 17,051—Spottiswood *v.* Prestongrange's Crs., 1741, M.,
v. Andrew, 1748, M., 10,406, 16,981. See the chapter on *rei interventus*,

(*d*) Act quoted *supra*, § 574—See also Watson *v.* Forrester, 1708, M.,

(*e*) Adamson *v.* Adamson, 1834, 12 S., 359—Chalmers *v.* Chalmers, 1
—See *per curiam* in Bryson *v.* Crawford, 1833, 12 S., 39—and *supra*, § 40

(*f*) Muir *v.* Gemmell, 1805, Hume D., 342. (*g*) Davids
1805, M., 14,584; 1 Dow, 1; 2 Bligh, 529, S. C.—Wood & Small *v.* Spe

(*h*) Stewart *v.* Bannatyne, 1777, 5 B. Sup., 6310; Hailes, 762, S. C.

[4] It seems settled that a writing signed by the trustee is sufficient, if
city of the subscription be admitted or proved; and it appears doubtfu
subscription of the trustee is essential. In a declarator against two defen
found that one of them, and a party deceased, represented by the other, h
in trust for the pursuer; the former defender admitted the trust, but the s
denied it. The proof against him consisted chiefly of the books of the a
which were holograph of him, but not signed by him. The Lord Justice
and Lords Wood and Cowan indicated an opinion that these books, as
alleged trustee, were competent proof of trust; but holding that, when pro
was admitted of trust, it was necessary that the proof should be clear an
they thought the books did not unequivocally establish trust, and, ther
proof was insufficient; Seth *v.* Hain, 1855, 17 D., 1117. But in a subseq
Deas, referring to the case of Seth *v.* Hain, said that he was not prepared
the subscription of the alleged trustee could be dispensed with; Walker
Kennedy, & Co., 1857, 20 D., 259, 269. In a still later case, the eviden
a declarator of trust, brought after the death of the alleged trustee, was a
by his agent, and the oath of the agent that the letter had been written
instructions of the alleged trustee. This evidence was rejected as not
statute; but had the instructions to the agent been embodied in a writi
the alleged trustee, the judgment would probably have been different
Lyell, 1859, 21 D., 514.

[5] In Walker *v.* Buchanan, Kennedy, & Co., *supra*, the question was w

86. In general the writs of the granter of an absolute dis-
on cannot limit the right of the grantee; yet where the
r, being abroad at the time of executing such a deed, in
nitting it executed to the disponee informed him by letter
e signed only in trust, and on the faith of a backbond being
ed without delay, the Court rightly held that the letter must
d along with the deed, as qualifying the right of the dis-
(*i*).

PTER VIII.—PROOF OF INTROMISSIONS WITH MOVEABLES AND MONEY.

87. Intromissions with corporeal moveables, except sums of
, may be proved *prout de jure* (*a*).

88. When a person has unwarrantably intromitted with
belonging to another, it would seem that not only the fact of
nission, but also the amount of money received, may be proved
de jure; because the person to whom the funds belonged had
ver of securing written proof, and he did not trust to the in-
ter's oath (*b*). In general, also, such cases involve fraud, or
t a wrongful act, on the part of the intromitter. These prin-
were applied, in the last reported case, as to proving intro-
n by one who was not an executor with funds belonging to a

Robertson *v.* Duff, 1840, 2 D., 279, particularly Lord Fullerton's opinion, ib., p.
e *supra*, § 184, *et seq.* (*a*) Stair, 4, 43, 3—Ersk., 4, 2, 21—Spence *v.*
, 1706, M., 12,333—Hamilton *v.* Hamilton, 1626, M., 12,359 (note)—Bisset *v.*
1624, M., 12,358. In Mitchell *v.* Berwick, 1845, 7 D., 382, this doctrine was ex-
to a case where a tenant averred that his landlord had got payment of rent by
of crop and stock which had been sequestrated, and which the landlord had sold
n arrangement with the tenant. (*b*) See Ersk., *supra*—Tait, Ev.,

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absolute was in trust. The holder of the deed admitted that it had, at first, been
d by a back letter, but that the letter had been destroyed by agreement of par-
n this case it was held that the presumptions of statute being intended for the
on of writs in their constitution apparently absolute, while the writ in question
ved to have been *ab origine* a security, it lay on the party alleging that the deed
n changed from a deed in security to an absolute deed, to prove that allegation.
rd Deas thought that the rule of the statute should have been applied, and the
stained as an absolute deed, because there was not the statutory proof of trust.
e, § 16, note [21].

deceased person; proof *prout de jure* having been recei
some earlier cases, however (which are very shortly r
amount of money so intromitted with was allowed to b
by the intromitter's writ or oath (*d*). But these dec
probably not be followed now.

§ 589. It has been held in several cases that where
creditor has entered into possession of the subject of
and drawn rents, the debtor, or one in his right, alleg
intromission has been sufficient to extinguish the deb
that fact *prout de jure* (*e*). The reason is, that he did
the intromitter's oath, and he had no means of securi
that party's writ; for, even if written acknowledgmen
granted to the tenants in the land, these may have bee
party founding on the intromission, owing to causes
control. The authority of the decisions referred to is i
case where parole proof that an heritable creditor had
the debt by intromission with rents, was held inadmiss
(Ordinary) Mackenzie, and the Court adhered to his ju
His Lordship felt difficulty in allowing the tenants
themselves of their rents by their own oaths, and he
more favourably on the oaths of third parties deponi
had seen the payments made. The Inner House s
taken the same view.

§ 590. The law is not settled as to the admissibil
to prove intromissions by one authorised to receive m
ing to another. The general rule probably is, that the
in such a person implies that the amount of his intro
be proved only by his writ or oath, and not by parole
there is ground for suspecting fraud, or even if a sp
fraud is averred (*h*), there seems to be no reason to doub
will be admitted; otherwise a rule designed for the
bona fide intromitters would secure the fraudulent from

(*c*) Moffat *v.* Phin, 1671, M., 12,369. (*d*) Bisset *v.* Bisset,
v. Hamilton, *supra*—Ker *v.* Robertson, 1626, M., 12,359, note.

(*e*) Fowlis *v.* L. Lovat, 1626, M., 12,735, *ad finem*—Wishart *v.* A
9978—Baillie *v.* Menzies, 1711, M., 9990—Stair, 4, 43, 4—Ersk., 4, 2
See Bowman *v.* Ker, 1697, 4 B. Sup., 384. (*f*) Robison *v.*
541; 2 De. and And., 284, S. C. (*g*) This follows *e converso*
21. It is supported by Hall *v.* Bar, 1647, 1 B. Sup., 445—Mackenzie
1709, M., 12,372—and Cooper *v.* Donald, 1827, 6 S., 213. See also ca
§ 620. The contrary case of Visc. Oxenford *v.* Cockburn, 1677, 1 B.
to have involved fraud, or something approaching it. (*h*)
Cockburn, *supra*. See also *supra*, §§ 344, 345, and *infra*, § 628.

591. Where the proof is at the instance of the intromitter—n order to establish homologation, *rei interventus*, possession, he like—parole is admissible (*i*). And it is thought that in ase evidence *prout de jure* may be received, where the object prove intromission merely as a fact, and not to fix on the intro- the receipt of particular sums of money.[1]

CHAPTER IX.—PROOF OF LOAN OF MONEY.

592. A loan of money beyond £100 Scots (£8 : 6 : 8 sterling) nly be proved by the debtor's writ or oath on reference (*a*). Stair lays down this rule generally as to all loans (*b*). But it seem that, when the amount does not exceed £100 Scots, is admissible (*c*), unless it is the balance of a debt beyond um (*d*).

itnesses have been rejected where the defender admitted hav- ceived the money, but denied that it was in loan (*e*).

will not open the door to parole that it is tendered in support improbative document signed by the debtor (*f*).[2]

Chalmers *v.* L. Craigievar, 1628, M., 12,368. (*a*) Gray *v.* Grant, 1789, 4—Tarbet *v.* Bennet, 1803, Hume D., 500—Paterson *v.* Mackenzie, 1824, 3 S., 'Master *v.* Brown, 1829, 7 S., 337—Birnie's Assignee *v.* Darroch, 1842, 4 D., Tarbet *v.* Bennet, and M'Master *v.* Brown, the defender's judicial examination l incompetent. (*b*) Stair, 4, 43, 4. See also Hume D., 500, note— ., 307. (*c*) Ersk., 4, 2, 20—Hammermen of Glasgow *v.* Crawford, 1628, 08—Thallane *v.* Orrock, 1673, M., 12,585. See *infra*, § 611. (*d*) Clark 1836, 14 S., 966. (*e*) Hamilton *v.* Lindsay, 1824, as noticed in 1 W. See Ross *v.* Crawford, 1847, 19 Sc. Jur., 639. (*f*) Stewart *v.* Symes, c. 1815, F. C.

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was held competent to prove *prout de jure* that the collector for a public institu- , during a series of years, received certain sums and failed to account for them, the accounts had been examined yearly; Glasgow Royal Infirmary *v.* Caldwell, D., 1. See Laing *v.* Laing, 17th July 1862, 24 D., 1362, as to the effect of docquets of the accounts of an inspector of poor, in an action of count and reck- gainst him; *supra*, § 152, note [1].

e Dowdy *v.* Graham, 1859, 22 D., 181. Where there is a written acknowledg- receipt of money, the party who received the money must show competently did not receive it in loan; Fraser *v.* Bruce, 1857, 20 D., 115. See § 153, note [3], 37, note [1].

n action for payment of money alleged to have been lent, it was held that the not proved *scripto*, by two letters of the debtor importing that he was in debt to

CHAPTER X.—PROOF OF PROMISE TO PAY MONEY.

§ 593. Writ or oath of party is requisite in order to
promise to pay a sum exceeding £100 Scots (*g*); but a pr
pay a smaller sum may be proved *prout de jure* (*h*). And
seem that this is also the case when the amount is £100 S
actly (*i*). In calculating the amount, the stipulated penal
taken into view (*k*). If the obligation as regards the debto
the sum referred to, parole is not admissible on account of
ing two or more creditors, each of whom is only entitled to
sum (*l*). If the obligation is beyond £100 Scots, witness
missible to the effect of sustaining decree for that sum (*m*

§ 594. It has been held that the objection to proving
to pay money by parole must be taken when the evidenc
dered, and is barred by the debtor's delay to plead it till
proof has been adduced (*n*).

(*g*) Fotheringham *v.* Watson, 1623, M., 16,830—Anderson *v.* Tarba
16,836—Gordon *v.* Murray, 1765, M., 16,851—Walker *v.* Home, 1827, 6 S.
tra, Drummond *v.* Bisset, 1551, M., 12,381—Aitchison *v.* Herring, 1636,
Dickson *v.* Dickson, 1671, M., 17,020—Colquhoun *v.* M'Rae, 1687, M., 12,
which are of older date than the cases cited in support of the text.
Lernoch *v.* L. Preston, 1636, Durie, 798—Craw *v.* Culbertson, 1663, M.,
Cheyne *v.* Keith, 1664, M., 12,385. (*i*) L. Lernoch *v.* L. Pre
Hammermen of Glasgow *v.* Grant, 1628, M., 12,408—Ochiltree *v.* Mil
16,834—Gordon *v.* Murray, 1765, M., 16,851—Anderson *v.* Tarbat, 1668
Contra, Bryce *v.* Kirkpatrick, 1675, M., 12,282. (*k*) Halkerston *v.*
M., 16,831. (*l*) Anderson *v.* Tarbat, *supra*. (*m*) Gord
1765, M., 16,851. (*n*) Wood *v.* Robertson, 1672, M., 12,225—
1822, 3 Mur., 16.

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the pursuer, but not specifying either the amount or nature of the debt, a
was dismissed; Hilson *v.* Marshall, 1861, 23 D., 1276. In an action fo
£30, as having been lent to the defender, the pursuer founded on an I O
fender's clerk for the defender. The defender answered that the pursu
larger sum; and he proved that he had sent his clerk to demand paym
loan, and had not authorised his clerk to give an I O U. It was held tha
had not proved the loan; Woodrow *v.* Wright, 1861, 24 D., 31.

CHAPTER XI.—PROOF OF GRATUITOUS PROMISES.

595. Gratuitous promises can only be proved by writ or oath erence, even where the amount is within £100 Scots (*o*). But such a promise forms part of a contract proveable by wit-, it may be competently included in the proof (*p*).[1]

HAPTER XII.—PROOF OF CAUTIONARY OBLIGATIONS AND OBLIGATIONS OF RELIEF.

596. The many cases which have occurred as to the proof of nary obligations are not marked by uniformity, nor are the on the point accurately defined by our institutional writers. e first question is whether, apart from any question of *rei in-tus*, a cautionary obligation can be constituted without writ-

597. Professor Bell (*a*) lays down that "in Scotland the rule t no cautionary obligation or guarantee can be constituted by agreement; so that an acknowledgment or a reference to oath ot constitute an effectual guarantee." In another place (*b*) me learned author classes cautionary obligations among con- for which writing is required only in evidence, not *ex solen-*, and which may be proved by oath or admission of party. atter of these contradictory views is the correct one. It ac- with the law laid down by Lord Stair (*c*), that "caution is in-sed any way by which the consent is freely and truly given." rskine (*d*), taking the same view, includes cautionary obliga- among those for which writing is commonly used, as distin-ed from those to the constitution of which it is essential. And

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Stair, 1, 10, 4—Ersk., 4, 2, 20—Tait Ev., 304—A B, 1672, 2 B. Sup., 627—. Russell, 1703, M., 12,331—Campbell *v.* M'Lauchlan, 1752, M., 12,286—Millar amondo, 1771, M., 12,395; Hailes, 409, S. C. (*p*) Stair *supra*. See 599. (*a*) 1 Bell's Com., 371—See also Bell's Pr., § 248. Bell's Pr., § 18. (*c*) Stair, 1, 17, 3. (*d*) Ersk., 4, 2, 20.

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lackenzie *v.* Brodie, 1859, 21 D., 1048, *supra*, § 367, note [1].

in several cases the Court have held that obligations of t
may be proved by writ or oath of party (*e*).[1]

§ 598. But there are some cautionary obligations, v
immemorial usage have been constituted only by writing.
there seems to be *locus penitentiae* from the verbal unde
because where a party agrees verbally with a view to a su
written contract, the obligation is held to be suspended
writing has been executed (*f*). This principle applies to
caution (*g*); and probably it would be held in regard to ca
public functionaries discharging their duties, and to ca
cash credits (*h*).

§ 599. While, however, other cautionary obligations th
just noticed may be constituted verbally, it is settled law
can only be proved by the cautioner's writ or oath on refer
not by parole (*i*). To this rule there is only one exception
cautionary obligations which form integral parts of such
concerning moveables as are proveable by witnesses. T
well as the principal obligations to which they are access
be proved *prout de jure* (*k*).[2] If, however, the caution to
obligation was interposed after an interval, it can only b
by the cautioner's writ or oath (*l*).

§ 600. The next question is, whether the writing by
cautionary obligation can be proved must be holograph o
tive; or whether mere subscription to a document which
such an obligation is sufficient.

(*e*) Auchinleck *v.* Gordon, 1580, M., 12,382—Donaldson *v.* Harrower
12,385—Deuchar *v.* Brown, 1672, M., 12,386. See also *per curiam* in
M'Lauchlan, 1752, M., 12,286—More's note to Stair, 1, 17, 8. (*f*
§ 603, *et seq.* (*g*) Shirra *v.* Douglas, 1798, M., 16,946—Chaplin *v.*
4 D., 616. It would seem from the first of these cases that *rei interventus* o
obligation will not make it effectual. (*h*) See More's note to Stair
(*i*) Ersk., 4, 2, 20—1 Bell's Com., 371—Bell's Pr., § 18; 248—Cases *sup*
—Reid *v.* Proudfoot, 1758, M., 12,344. This holds although the obligatio
£100 Scots; Tassie *v.* M'Lintoch, 1764, 5 B. Sup., 899—Deuchar *v.* Brow
12,386—Wood *v.* Robertson, 1672, M., 12,225. (*k*) Ivory's note to
20—Bell's Pr., § 249—More's note to Stair, 1, 17, 8—Gib *v.* Walker,
"Cautioner," No. 19—Bell, 13th Nov. 1812, F. C.—Rhind *v.* Mackenzie
1816, F. C. See Campbell *v.* M'Lauchlan, 1752, M., 12,286—M'Ewan
13th Feb. 1816, F. C.—These cases are noticed *infra*, § 601. (*l*)
M'Lauchlan, *supra*—Campbell *v.* Monro, 1815, Hume D., 106—Deuchar *v.*
M., 12,386.

[1] Altered by the Mercantile Law Amendment Act, 19 and 20 Vict., c. 6
infra, § 601, note [4].

[2] Altered by Mercantile Law Amendment Act, § 6. See *infra*, § 601, n

If the informal obligation has been interposed in the course e (*e.g.*, a guarantee for goods already furnished) it is effec- though it has not been followed by *rei interventus;* writings *ercatoria* being among those to which the statutory solem- do not apply (*m*).

If the cautionary obligation, although not *in re mercatoria*, en followed by *rei interventus*, it will be effectual, although iting which embodies it does not bear the statutory solemni- The rules as to the acts sufficient to constitute *rei interventus* sidered afterwards (*n*). It is enough to mention here that ht to resile from an improbative deed can only be exercised natters are entire, and is excluded where anything has taken nder the contract by which the relative position of the par- s been materially altered. Some cases illustrative of the e are collected below (*o*).

When the case does not come within either of the excep- hus noticed, it is settled law that a writing, in order to con- a cautionary obligation, must be either holograph or proba- terms of the acts regarding the authentication of deeds (*p*). s merely subscribed by the cautioner without the statutory ities, it is null, although the party founding on it offers to

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Bell's Com., 325—1 Bell's Illust., 176—Thomson *v.* Gilkison, 1831, 9 S., 520—Campbell *v.* Lennox, 1789, M., 16,982, 16,979—Clark *v.* Ross, 1779, M., 16,942, ted in Hailes, 817. In Paterson *v.* Wright, 31st January 1810, F. C., affd. 1814, Appx. to 15 F. C., 506, the Court were much divided in opinion as to a guarantee for part furnishings is a document *in re mercatoria;* and the lean- e decision is against its being so considered. The point did not require to be owing to the guarantee in that case embracing both past and future furnishings; e latter had been made on the faith of the guarantee, the *rei interventus* was ave validated the obligation as a whole, for the obvious reason, that the future gs would not have been made except on the footing of a guarantee for the price of them but of the others also. It is thought that, according to correct prin- well as on the authorities cited above, a guarantee for goods already furnished er mercantile transaction; and this seems to have been the view of the Court te cases, where the point was noticed incidentally from the bench, namely, Bal- *v.* Carter, 1842, 4 D., 419; Johnston *v.* Grant, 1844, 6 D., 875.

. ii, b. 1, t. 1, c. 4, on *rei interventus*. (*o*) Brown *v.* Campbell, 1794, M., Sinclair *v.* Sinclair, 1795, Bell's Fo. Ca., 140—Manderson *v.* M'Niven, 1802, ., 90—Douglas *v.* Clapperton, 1809, ib., 105—Dunmore Coal Co. *v.* Young, 1st 1811, F. C.—M'Neil *v.* Black, 1814, Hume D., 103—Miller *v.* Dott, 1814, ib., otter *v.* Martin, 1817, ib., 105—Grant *v.* Macdonald, 1827, 5 S., 317—Martin *v.* , 1828, 6 S., 859—Hamilton *v.* Wright, 1836, 14 S., 323; affd., 3 S. and M'L., ylor *v.* Simson, 1836, 14 S., 935—Ballantyne *v.* Carter, 1842, 4 D., 419—John- Grant, 1844, 6 D., 875—Paterson *v.* Wright, *supra*, (*m*). (*p*) See cases l in 1 Bell's Illust., 174, *et seq.*

prove the genuineness of the subscription by parole or
reference (*r*), or although the fact be admitted on record

(4.) The question is still open, whether a guarantee fo
by a bank to a merchant in the course of trade is val
merely subscribed by the obligant, or whether it must be
tutory solemnities. On the one hand it is maintained
transactions are *res mercatoriae*, a banker being merel
merchant; and that as a guarantee for the price of past f
of goods is valid although not holograph or tested, so ou
rantee for furnishings of money (*t*). On the other hand
tended, on grounds which, if more in accordance with la
consistent with justice, that a distinction should be draw
obligations which are really commercial in their cha
those which have only an accidental relation to comm
that advances of money, although to a merchant, fall
latter class (*u*).

§ 601. It has sometimes been considered that *rei*
proceeding on a verbal guarantee, opens the door to parc
the obligation (*x*). But the law is now settled, that ev

(*r*) Crichton *v.* Syme, 1772, M., 17,047—Edmonstone *v.* Lang, 1786
Bell's Pr., § 248—1 Bell's Illust., 175—More, 104. In Welsh *v.* Ker, 1
where reference to oath was allowed to prove the verity of the subscripti
from the session papers that there was *rei interventus.* (*s*) Edmon
supra—Walker *v.* Duncan, 1785, Hailes, 985—Wallace *v.* Wallace, 1782
More's note to Stair, 1, 17, 3. This doctrine is implied in the cases upon
setting up an informal cautionary obligation. (*t*) In support o
Thomson *v.* Gilkison, 1831, 9 S., 520—per Lords Medwyn and Cockburn
Grant, 1844, 6 D., 875; and per L. Cockburn (Ordinary) in Ballantyne *v*
4 D., 419. (*u*) See per Lords Moncrieff and Just.-Cl. Hope
Grant, *supra*, and per Lords Gillies and Fullerton in Ballantyne *v.* Carter
(*x*) Johnstone, 1687, M., 12,388—See Porteous *v.* M'Beath, 1812, Hum
doctrine of *rei interventus* does not properly apply to a verbal guarantee
not essential to the constitution of a cautionary obligation. See *supra*, §

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[3] This is contrary to the doctrine stated by Professor Bell, Prin., § 2
writing of which the subscription is acknowledged is good evidence of ca
the rule stated in the text has recently been expressly affirmed, and P
doctrine rejected. The general rule is, that a cautionary obligation is *liter*
and where there is no *rei interventus*, an improbative bond of caution
This was held where the deed was a bond of caution for a sum lent, unav
the English form, and where the cautioner admitted his subscription. B
may be validated *rei interventu;* and payment of the money on the faiti
was held sufficient *rei interventus* to validate the bond, though the cau
know of the payment; Church of England Life and Fire Assurance Co
414, 1079. See *infra*, § 601, note [4].

he obligation can only be proved by the cautioner's oath on ce or written admission (*y*). In applying this rule to gua- for the price of future furnishings of goods, a distinction n drawn between a general guarantee undertaken some time the goods are furnished, and a special guarantee interponed but with immediate reference to a transaction, which is to and completed upon the faith of it. While guarantees former class cannot be proved by parole (*z*), the others seem e under the rule whereby witnesses are admitted to prove a ary obligation, which is truly incident and accessory to a tile contract proveable by parole; for it would be a narrow that principle to limit it to cases where the guarantee inter- *n ipso actu* with the main contract (*a*). Accordingly, where aving refused to sell lambs to Walker without a guarantee price, Walker referred him to Simpson, who on Gibb's appli- said, "If Walker buys your lambs, give them to him, and I e you paid;" and where the lambs having been delivered to accordingly, Gibb sued Simpson for the price, the Court the obligation to be proved by parole (*b*). Here, therefore, rantee, although not interposed at the moment of completing e, or in the presence of the purchaser, was part of the *res* of the transaction, as much as if the whole matter had been d at one time; and parole was properly admitted to prove ire transaction.[4]

92. The principles above noticed apply to obligations of

eir *v.* Russell, 1703, M., 12,331—Tassie *v.* M'Lintoch, 1764, 5 B. Sup., 899— *v.* Monro, 1615, Hume D., 108, *ad finem*—M'Ewan *v.* Crawford, 13th February C.—Chaplin *v.* Allan, 1842, 4 D., 616. (*z*) M'Ewan *v.* Crawford, *supra.* . (*a*) This was the view of the majority of the Court in Campbell *v.* n, 1752, M., 12,286, where, however, the point did not require to be decided. ibb *v.* Walker, 1751, Elch. Notes, "Cautioner," No. 19.

law now is, that all cautionary obligations must be in writing. Much of the the constitution of cautionary obligations, stated in the text has been super- the Mercantile Law Amendment Act, 19 and 20 Vict., c. 60. The 6th section provides, "From and after the passing of this Act all guarantees, securities, ary obligations made or granted by any person for any other person, and all ations and assurances as to the character, conduct, credit, ability, trade, or of any person, made or granted to the effect or for the purpose of enabling on to obtain credit, money, goods, or postponement of payment of debt, or of obligation demandable from him, shall be in writing, and shall be subscribed rson undertaking such guarantee, security, or cautionary obligation, or making resentations and assurances, or by some person duly authorised by him or erwise the same shall have no effect." The act does not alter the previous the kind of writing necessary, except by providing that it must be subscribed

relief; which in general cannot be proved by parole
they are undertaken in writing, the statutory formali
observed; but objections on this head will be obviated
ventus (*d*); and parole will be admitted to prove the
when it forms part of a transaction which may be es
that means (*e*).

CHAPTER XIII.—OF THE PROOF OF OBLIGATIONS WI PARTIES HAVE AGREED TO COMMIT TO WRIT

§ 603. Where law does not require writing *de s*
will yet be essential, if the parties stipulate for it; a
them may resile, as from an unfinished bargain, so lon
has not intervened (*f*). This rule, of course, only hold
stipulation for written proof was a suspensive condition
tract (*g*); for if the parties bound themselves by the ve
and merely agreed to reduce its conditions into writing
they came under an obligation to execute a deed in t
ranged (*h*). But this state of facts will require to be
presumption being that a stipulation for writing is a
condition. The same principle applies in legacies.
expressly leaves a nuncupative legacy, it is valid and p

(*e*) Ersk., 4, 2, 20—Donaldson *v.* Harrower, 1668, M., 12,385—Re
1758, M., 12,344—Clark *v.* Callander, 9th March 1819, F. C.; affirmed
June 1819. (*d*) Wallace *v.* Wallace, 1782, M., 17,056.
§§ 595, 599, 601. (*f*) Ersk., 3, 2, 4—1 Bell's Com., 327—Bell's
224, 318—Thomson *v.* M. Breadalbane, 1854, 16 D., 943—Wallace &
1766, M., 8475; Hailes, 27 S. C.—Brown *v.* L. Rollo, 1832, 10 S., 667
Stewart, 1700, 4 B. Sup., 473, this rule was applied, although earnest
given on the verbal contract. In Campbell *v.* Douglas, 1676, M., 8470
be an intrinsic quality in an oath on reference, that the parties had ag
the contract to writing. (*g*) Bell's Com., *supra*—Bell's Pr.,
(*h*) Bell's Com., *supra*—Bell's Pr., *supra*.

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by the cautioner or by some person authorised by him; and it would
general it must be a probative writing. The 7th section of the act p
cautionary obligation granted to or for a firm shall be binding after a
firm, unless the contrary be expressed or necessarily implied. The 8th
cautioners of the benefit of discussion; and the 9th provides that the dis
several co-cautioners shall operate the discharge of all. It has been h
section has no application to cautionary obligations constituted before t
act; Church of England Life and Fire Assurance Co. *v.* Hodges, 1857,

parole, although he should afterwards direct it to be committed to writing, and should die before that has been done (*i*); whereas a mere direction to a man of business to prepare a writ containing a legacy is inchoate (*k*).

§ 604. On the same principle, where the parties to holograph or probative missives stipulate that a deed shall be entered into containing the conditions of the contract at length, they bind themselves to execute such a deed (*l*). But if the preliminary documents show that they intended there should not be a concluded contract until the deed should have been executed, there is *locus penitentiae* until that has been done (*m*).

§ 605. The stipulation for written proof may be waived by consent of parties; and the waiver may be proved by oath on reference, by facts and circumstances (*n*), and perhaps by parole evidence generally.

CHAPTER XIV.—PROOF OF PERFORMANCE OF OBLIGATIONS CONSTITUTED BY WRITING.

§ 606. Where a debt or obligation is constituted by writing, the general rule is that writ or oath is required to prove payment or performance of it in whole or part (*a*).[1] And this holds although

(*i*) Mitchell *v.* Pinkerton, 1744, Elch., "Legacy," 13. (*k*) See Monro *v.* Coutts, 1813, 1 Dow, 437—Stainton *v.* Stainton's Tr., 1828, 6 S., 363—Walker *v.* Steele, 1825, 4 S.—Ivory's Ersk., 3, 9, 7, note *. (*l*) Bloomfield *v.* Young, 1753, M., 9446—Rutherford *v.* Bowden Feuars, 1748, M., 8443—Muirhead *v.* Chalmers, 1759, M. 8444. (*m*) Alexander *v.* Montgomery, 1773, 2 Pat. Ap. Ca., 300—Monro *v.* Coutts, *supra*—Stainton *v.* Stainton's Tr., *supra*. (*n*) Hay *v.* M'Teir, 1806, Hume D., 836, compared with Ogilvy *v.* Stewart, *supra*. (*a*) Stair, 4, 43, 4—Ersk., 4, 2, 21—Tait, 320. So held as to payment of a bond; Napier *v.* E. Eglinton, 1671, M., 12,318—Vaus *v.* Brown, 1627, 1 B. Sup., 143—Gordon *v.* M'Intosh, 1710, M., 16,974; and as to payment of a bill, Black *v.* Bell, 1831, 9 S., 486—M'Donald *v.* M'Gregor, 1803, Hume D., 499; as to payment of a legacy constituted by writ, Grierson *v.* King, 1781, M., 17,054; of an annualrent, Dalrymple *v.* L. Closeburn, 1632, M., 9855, 12,360—Crichton *v.* Maitland, 1630, M., 12,360—Hay, 1626, M., 12,359—(*Contra*, L. Semple *v.* L. Somerville, 1623, M., 12,357); payment of rent under a written lease, L. Romano *v.* Nisbet, 1609, M., 12,355; and of feu-duty, Calpie *v.* Kennedy, 1631, M., 12,360; 1 B. Sup., 320. (The contrary decision, Hamilton *v.* Smith, 1667, M., 12,363, is evidently erroneous.)

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[1] In Stewart *v.* Central Bank of Scotland, 1859, 21 D., 1194, Lord Deas expressed an opinion, that a bank deposit-receipt was not sufficiently discharged by the bank obtaining possession of the receipt. His Lordship thought a written discharge was necessary.

the sum be within £100 Scots (*b*). In one old case, where due under a "ticket" consisted of £300 Scots of money price of a pipe of sack and a tun of beer, writ or oath was only as to payment of the latter (*c*). But this distincti well founded; because the origin of the debt is unimport it has been constituted by writing.

The ground for this rule evidently is, that witnesses a mistake both the amount of money paid, and the precise the payment; while both in principle and practice an constituted by writing cannot be extinguished by parole.

§ 607. An exception to the general rule occurs in written obligations *ad facta praestanda;* the performance being proveable *prout de jure* (*d*). Thus parole is admiss contracts for executing works which are palpable, such as a bridge, or performing a voyage (*e*), delivering grain (*f*), chain (*g*), and the like (*h*). The reason is, that the fact is and easily remembered, while it must be presumed to hav fulfilment of the antecedent obligation, unless another ca is proved.

Mr Tait limits this exception to the performance of act implement of corresponding obligations; so that where t tion is to pay money, or to perform acts of one descripti is inadmissible to prove that it was implemented by acts o kind (*i*). But the cases on which that author founds ha out his view (*k*). The Court once rejected parole evide

(*b*) ——— 1672, 2 B. Sup., 627—M'Donald *v.* M'Gregor, 1803, Hun M'Gill *v.* Forret, 1622, M., 12,357—Nisbet *v.* Short, 1624, M., 12,358—Ha 12,359—Maxwell *v.* Aitkenhead, note to Nisbet *v.* Short—L. Romano *v.* M., 12,355—Calpie *v.* Kennedy, *supra.* The Act of Sederunt 8th June 159 parole below £100 Scots, only applies where the debt is not constituted by

(*c*) Finlayson *v.* Lauder's Ex., 1626, M., 12,359. (*d*) Stair, 4, 43, 4 21—Tait, 322. (*e*) Stair, ib.—Tait, ib. (*f*) Stair, ib.—Little *v.* Hill M., 12,356—Bisset *v.* Bisset, 1624, M., 12,358—Ferguson's Ex. *v.* Campbe 12,361—Lady Abergeldie *v.* her Son, 1633, M., 12,361—Bennet *v.* Fould 12,360—E. Lauderdale *v.* his Tenants, 1662, M., 10,023—Agnew *v.* Agne 12,364. (*g*) Hamilton *v.* Lady Pittenweem, 1620, M., 12,357. (to delivery of salt under a bond; Young *v.* Simpson, 1629, M., 12,725; and ing a process to the clerk of Court, where the agent's receipt stood unscor gularity in scoring receipts was offered to be proved; Fraser *v.* Urquhart 723—See also Farquhar *v.* Wallace, 1629, M., 12,374. (*i*) Tai

(*k*) These cases are, Tennant *v.* L. Traquair, 1606, M., 12,355—Po Harries, 1632, M., 12,361—M'Duff *v.* Stewart, 1674, M., 2565, 12,363- Brown *v.* Akeman, 1649, 1 B. Sup., 423, where the Court allowed proof b of delivery of grain in satisfaction of rent payable in money.

livery of goods, under a bill of lading unretired (*l*). The decision, however, may be questioned.

§ 608. Payment may be proved by parole in cases of fraud; since, if the allegations were true, there would probably not be better proof of them (*m*).

§ 609. When a party entitled to receive money alleges it was paid, he may prove the fact *prout de jure;* because the proper written evidence of it would be a discharge subscribed by him, and delivered to the other party, for the preservation of which the granter is not responsible (*n*). This rule has repeatedly been applied in proof of possession by drawing rent or interest of money (*o*), and in proof of homologation and *rei interventus* (*p*). But it does not apply to averments made by the creditor of payments on account of a prescribed debt, when founded on to prove resting-owing; the relative statutes requiring proof of that fact by the debtor's writ or oath (*r*).

§ 610. Where payment is averred by the debtor, not with a view to extinguish the obligation, but as a fact inferring *rei interventus* or the like, it is doubtful whether proof by the other party's writ or oath is required. The relevancy of the fact in such a case does not depend on the precise amount of the money, which is the point most likely to escape the recollection of witnesses; nor is the parole proof opposed to the written obligation, as the party who received the money denies that the obligation existed. On the other hand, there is risk of the witnesses mistaking the object of the payment; while the party who made it ought to have taken a written acknowledgment. It is thought that the proof should be received (*s*).

CHAPTER XV.—PROOF OF PAYMENT AND PERFORMANCE OF OBLIGATIONS NOT CONSTITUTED BY WRITING.

§ 611. Payments of money in implement of obligations not

(*l*) Wilson *v.* Kay, 1787, M., 12,353—See on this case Tait on Ev., 323.

(*m*) See Slumond *v.* Wood, 1662, M., 12,309—Foggo *v.* Hill, 1840, 2 D., 1322, per Lord Fullerton. See *infra*, § 628. (*n*) Ersk., 3, 3, 50. (*o*) Chalmers *v.* L. Craigievar, 1628, M., 10,061; 12,368—Ross *v.* Elliot, 1630, M., 12,369—Thomson *v.* Ross, 1673, 2 B. Sup., 171. (*p*) Garden *v.* Chalmers, 1636, M., 9024; 12,362. See Foggo *v.* Hill, *supra*. (*r*) See *supra*, §§ 450, 512. (*s*) See Foggo *v.* Hill, *supra*, particularly Lord Fullerton's opinion—*Contra*, Lawrie *v.* Craik, 1697, M., 8425; 12,365.

constituted by writ may be proved by parole, provided their several amounts do not exceed £100 Scots. But writ or oath is generally required in order to prove payment of any larger sum (*a*).[1]

§ 612. Yet where the contraction of an obligation, proveable by parole, and the payment of it took place at the same time—as where goods were bought and paid for on the spot—parole is admissible to prove the payment, although amounting to more than £100 Scots; because writing is not relied upon or expected on either side, and there is no peculiar risk of the witnesses being mistaken upon the matter (*b*). The same rule applies where the article sold is delivered at an interval after the bargain, and the purchaser avers payment on delivery (*c*). In one case, where it was averred that the price of a parcel of sheep had been paid a few days after the delivery, according to the custom of the trade, the Court admitted parole of the fact (*d*). But this decision has been questioned (*e*).

§ 613. In connection with this subject two cases may be mentioned in which the Court relaxed the strict rule as to proof of payment, where the money had been transmitted by post. In the first of these cases the defender objected to an article of £100, entered in the pursuer's account as money sent him by the pursuer by post in bank notes; but which he alleged he had not received, although he admitted that he had by letter commissioned the pursuer to transmit the money in that way. The Court having allowed a proof before answer, no direct evidence that the money had been despatched was adduced, in consequence of it being the pursuer's practice to

(*a*) Act of Sederunt, 8th June 1579—Ersk., 4, 2, 21—Tait Ev., 336—Tod *v.* Flockhart, 1799, Hume D., 498—Hume *v.* Hyslop, 1687, M., 12,365. In E. Lauderdale *v.* his Tenants, 1662, M., 10,023, 12,362, this rule was applied to payment of rent under a verbal lease. (*b*) Bell's Pr., § 565—Tait, *supra.* (*c*) Stewart *v.* Gordon, 1831, 9 S., 466—Tait Ev., 337. (*d*) Macdonald *v.* Callender, 1786, M., 12,366.
(*e*) See Hume D., 499—Tait, *supra.*

[1] A party who has received money on behalf of another must show by proper vouchers that he has discharged himself. He cannot do so by parole evidence; Mackenzie *v.* Brodie, 1859, 21 D., 1048.

A servant brought an action against his master for £32, as the balance of wages at 9s. per week due him, and the defender stated that only £26 was due. It was held that he was entitled to prove *prout de jure* that he had paid all the pursuer's wages except £26, because the balance disputed was a sum less than £100 Scots. Lord Deas observed, that he was not prepared to say that, in an action for weekly wages at 9s., or the like, the pursuer was limited in his proof to writ or oath of party if the sum he claimed exceeded £8, 6s. 8d.; nor, on the other hand, that a defender to such an action was so limited in his mode of proof, if he alleged that more than £8, 6s. 8d. was paid; Brown *v.* Mason, 1856, 19 D., 137.

enclose and seal up his remittances with his own hand; but the £100 had been entered in his cash-book on the evening of the day when it had been sent, and a copy of the letter remitting it had been engrossed in his letter-book. On advising the proof the Court considered that the additional evidence of the pursuer's books, and his oath in supplement, would suffice to establish the payment (*f*).

The other case referred to was an action for payment of £100, which a debtor of the pursuer had, at his desire, sent to the defender in order to be remitted to the pursuer. The defender alleged that he had remitted the amount to the pursuer by post in bank notes, in compliance with his request, contained in a letter acknowledged to be genuine. The circumstances founded on by the defender, and admitted by the pursuer, bore a close similarity to those in Cumming *v.* Marshall; and the defender tendered his oath in supplement to complete the proof. The Court was satisfied with this evidence. They were chiefly moved by the circumstance that the defender had acted from motives of friendship under a transaction from which he was not to derive any benefit, and which was based upon exuberant confidence; and they therefore considered that the strict rules of law should not be applied to the case. Their Lordships also thought it was "as much a matter of doubt that the letter had not reached the pursuer, as that it had been put into the post office by the defender;" and they did not think the defender's oath in supplement was necessary, although, as he had offered it, they allowed it to be taken (*g*). These cases are thought to be of little value as precedents.

CHAPTER XVI.—OF INFERRING PAYMENT FROM CIRCUMSTANCES.

§ 614. Although, as seen in the preceding chapters, payment cannot in general be proved by testimony, yet it may be inferred from circumstances which produce a reasonable belief in the fact. This exceptional principle, even more than the general rule, is consistent with the experience of mankind; for, if we can seldom rely on the accuracy and recollection of witnesses as to the amount and object of an individual payment, we often find facts, unquestionably

(*f*) Cumming *v.* Marshall, 1752, M., 12,366.

(*g*) Buchanan *v.* Buchanan, 7th February 1812, F. C., and session papers.

relating to the debt, which produce in every reasonable mind belief that it has been paid. Some of these circumstances, from their frequent occurrence, have given rise to presumptions of law, as seen in the rules *chirographum apud debitorem repertum presumitur solutum* (*a*), *chirographum non extans presumitur solutum* (*b*), the presumption arising from the *apocha trium annorum* (*c*), and the presumption that honoraries have been paid (*d*). In like manner the source of the triennial, quinquennial, and sexennial prescriptions is the inference arising from *mora*. But, besides these established rules, the concerns of daily life develop special circumstances not less convincing, and therefore not less entitled to receive effect in proving payment (*e*).

Such circumstantial proof has therefore been sustained, in regard not only to illiquid claims, but also to debts constituted by bill (*f*), bond (*g*), and even by bond with heritable security (*h*).

§ 615. The nature and strength of the circumstances which should be held sufficient to prove payment, must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other similar considerations. No general rule on the point, therefore, can be laid down more precise than this, that the circumstantial proof should only be sustained where it leaves no reasonable doubt that the debt in issue has been paid (*i*).

§ 616. Delay to claim payment during a number of years short of the prescriptive period corresponding to the debt, is, in general, not sufficient without some corroborating circumstances; as the several terms required for this purpose have been defined by the statutes regarding prescriptions (*k*). This has been repeatedly held as to taciturnity for twenty or thirty years, and even where an additional day of *mora* would have given the debtor the absolute protection of the long negative prescription (*l*). Yet where the debt

(*a*) *Supra*, § 380, *et seq.* (*b*) *Supra*, § 382, *et seq.* (*c*) *Supra*, § 384, *et seq.* (*d*) *Supra*, § 392, *et seq.* (*e*) Stair, 4, 45, 23—Bankt., 4, 34, 2—Ersk., 3, 7, 29—Tait, 444—Br. Synop., 1694—S. Dig., *voce* Payment, § 56—*Supra*, § 161, *et seq.* (*f*) Ryrie *v.* Ryrie, 1840, 2 D., 1210—Russell *v.* Fraser, 1788, M., 11,390. (*g*) Norkat *v.* Home, 1624, M., 12,701—L. Polwart *v.* Halyburton, 1667, M., 12,704—Stark *v.* Napier, 1672, M., 12,707—Macer *v.* L. Aldie, 1681, M., 12,708—Cochrane *v.* Houston, 1713, M., 12,715. But see Houston *v.* Houston, 1697, M., 12,712. (*h*) Stair, 4, 45, 23—Thomson's Tr. *v.* Monteith, 1834, 12 S., 842—Mackie *v.* Watson, 1837, 16 S., 73—S. C., 14 S., 156. (*i*) Cases in following notes. (*k*) Houston *v.* Houston, 1697, M., 12,712—Dobie *v.* Stevenson, 1823, 2 S., 358—L. Gordon *v.* Glendonwyn, 1838, 16 S., 645—Seath *v.* Taylors, 1840, 10 D., 377—Watson *v.* Johnstone, 1848, 6 Bell's Ap. Ca., 245. See § 618. (*l*) Graham *v.*

is of a kind usually paid immediately or after a short interval, long taciturnity has been held sufficient to infer payment. Thus, before the sexennial prescription of bills was introduced, the Court frequently inferred payment from the lapse of twenty years and upwards without demand for the debt (*m*). So, where a written obligation was entered into, in 1682, to deliver a certain amount of grain of that year's crop under a high penalty in case of non-implement; and, in 1722, the debtor granted an obligation waiving the plea of the long negative prescription, but reserving his defence of payment; the Court, in an action raised in the year 1759, for the penalty, held that the obligation must be presumed to have been implemented (*n*). Thus, also, in an action by the heir of a husband for payment of 2000 merks of tocher, it was found that the subsistence of the marriage for eleven years inferred that the claim had been paid, or that the husband had got as much of his wife's goods as satisfied it (*o*). And in an action by an innkeeper for payment of an account which extended over eighteen months, and included entries for "lodgings," "supper," "toddy," "horse's keep," and the like, the Court held that the pursuer must prove both the constitution and the subsistence of the debt; because uniform practice raises a presumption that a tavern bill was paid when contracted (*p*).

§ 617. In every question of presumed payment, indeed, taciturnity is an important element, and, when corroborated by other circumstances, has frequently been sustained as proving payment (*r*). For example, the circumstance that the creditor in one debt had paid the debtor sums on account of other transactions between them, without deducting or reserving his own claim, combined with *mora*, has been held sufficient (*s*); and payment has been inferred from the creditor having discharged the debtor of payment of sub-

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Veitch, 1823, 2 S., 594. In this case there were some circumstances corroborative of the inference from *mora*, but the Court did not think them sufficient. See, also, Currie *v.* Ford, 1828, 6 S., 1119, where payment of a legacy was not inferred from the lapse of forty-nine years since the testator's death, proceedings having been instituted for payment a few years after the death, and having been renewed at intervals afterwards.

(*m*) Cases in Br. Synop., 244, *et seq.* (*n*) Dunbar *v.* Innes, 1759, M., 11,644.

(*o*) Scotland *v.* Reid, 1682, M., 11,416. (*p*) Barnet *v.* Colville, 1840, 2 D., 337. (*r*) Besides the cases in the following notes, see L. Polwart *v.* L. Halyburton, 1667, M., 12,704—Mercer *v.* L. Aldie, 1681, M., 12,708—Cochrane *v.* Houston, 1713, M., 12,715—Bargeny *v.* Kennedy, 1697, 4 B. Sup., 454—French *v.* Cathcart, 1696 4 B. Sup., 293—Mackie *v.* Watson, 1835, 14 S., 156; S. C., 1837, 16 S., 73—Howden *v.* Howden, 1841, 3 D., 388. (*s*) Veitch *v.* Paterson, 1664, M., 11,883—Stamfield *v.* Hamilton, 1671, 1 B. Sup., 631. See also Stuart *v.* Maconochie, 1836, 14 S., 412.

sequent debts, without noticing the one sued for (*t*). The inference from such courses of dealing is sometimes sufficient to prove payment, although a lengthened period did not intervene (*u*). Again, where, after forty-six years' *mora*, action was raised by the heir of the creditor in a bond (his minority having saved the debt from prescription), and it appeared that a new bond had been granted many years before for nearly the same amount by the same parties, with the addition of a new cautioner, which bond had been paid, the Court held that payment of the debt sued for was to be presumed (*x*). In another case, payment of a bond by one brother to another was inferred, where for nearly twenty years no claim had been made for either principal or interest, although the debtor had been habit and repute solvent till his death (which happened several years before the action was raised), and where the creditor had, during his late brother's lifetime, made up or acquiesced in a state of accounts between them in which a considerable balance was brought out against himself (*y*). Again, where a father in a competition of creditors on the estate of his son, claimed on account of their joint acceptance, which had lain over for four years without any demand having been made against the son, the Court presumed that it had been paid at maturity with funds belonging to the proper debtor (*z*). But there was ground to suspect collusion in this case.[1]

§ 618. On the other hand, payment of a bond for £500 was not inferred in an action raised in the forteith year after the term of payment, where there appeared to have been an intention to pay it off a year or two after its date; where interest on it had been paid for five years from its date by one who had been agent for both debtor and creditor, but no payment had been made after that time, and where on the original debtor's death, thirteen years after the date of the bond, no claim had been made thereupon, although his creditors had been called by advertisement to come forward (*a*).

(*t*) Norkat *v.* Hume, 1624, M., 12,701. (*u*) See Thomson's Tr. *v.* Monteith, 1834, 12 S., 842—Stuart *v.* Maconochie, 1836, 14 S., 412—Cases in two preceding notes. (*x*) Stark *v.* Napier, 1672, M., 12,707. See also Tod *v.* Beattie, 1802, Hume D., 487. (*y*) Ryrie *v.* Ryrie, 1840, 2 D., 1210. (*z*) Baillie *v.* Wilson, 1840, 2 D., 495. (*a*) Graham *v.* Veitch, 1828, 2 S., 594. The report bears that the Court were agreed that presumptive evidence of payment of a written obligation, in order to be conclusive, must be "utterly irreconcileable with the idea that the bond is still due." But the cases in the preceding notes shew that this is too strongly stated.

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[1] Bannatyne *v.* Wilson, 1855, 18 D., 230.

And where a tenant of a farm under a lease for nineteen years was entitled to deduction of rent on account of the landlord resuming possession of some land at an early period of the lease, and also to recompense for ameliorations made by him (the tenant); and where he continued during his lease to pay the whole rent without deduction, and on leaving the farm granted a bill for the balance of his rent on that footing; in an action at his instance three years afterwards, when his claim, with interest, amounted to nearly £900, the Court held that there was not sufficient ground to infer that the debt had been discharged during the lease (*b*). Again, where a party indebted in £600 for the warrandice under a disposition and decree-arbitral, granted bill for the amount, in an action against his heir, several years after sexennial prescription had run on the bill, the Court would not presume that the debt had been paid, although that prescription is mainly founded on a presumption of payment (*c*).

§ 619. Nor does it raise a presumption of payment that the debtor granted a later obligation for the same (*d*), or a larger amount (*e*); or that in a subsequent transaction the position of the parties as debtor and creditor was reversed (*f*). But these may be important when in combination with other circumstances inferring payment; and, as already noticed, the fact of the later transactions having been settled without reservation may suffice to prove that the others are not outstanding (*g*).

Some other illustrations of circumstances which are insufficient to infer payment are given above (*h*).

§ 620. It will also be presumed that a person liable to account has done so, where, from the position of the parties, their previous dealings, the custom of the trade or business, or other circumstances, that is the natural inference (*i*). Thus where two brothers, William and George, had been co-executors of their father, and had lived together for a number of years after their father's death; and

(*b*) Halyburton *v.* Blair, 1837, 15 S., 750. With this case compare Veitch *v.* Paterson, 1664, M., 11,383. (*c*) Sinclair *v.* Sinclair, 1823, 2 S., 600. See also Campbell *v.* Campbell, 1797, M., 1648—Hunter *v.* Thomson, 1843, 5 D., 1285.

(*d*) Lady Ardblair *v.* her Husband, 1678, M., 11,384, 5030. (*e*) Haig *v.* Service, 1832, 11 S., 145. (*f*) Carnoway *v.* Stewart, 1611, M., 2600; 11,382—Murray *v.* Thomson, 1665, M., 11,214; 11,383—Somerville *v.* Muirhead's Ex., 1675, M., 11,384—Waddell's Tr. *v.* Scott, 1833, 11 S., 655. (*g*) *Supra*, § 617.

(*h*) *Supra*, § 616. See also Lovat *v.* Lovat, 1721, Rob. Ap. Ca., 355. (*i*) See *supra*, § 6.

where an action was raised by the *curator bonis* of George against the representatives of William, about twenty years after George had become insane, for payment of sums uplifted by William on account of the father's executry; the Court presumed that William had accounted to George for his share, or that some settlement had taken place between them (*b*). So where a son *in familia* had been in use during his father's lifetime, but without a written commission, to collect debts belonging to his father, and make payments without preserving vouchers; in an action by the father's heir to compel him to account for his intromissions, the Court would not hold him liable for any sums beyond those which might be proved by his writ or oath (*c*). Thus, also, where, on a person becoming superannuated, his eldest son had intromitted with his estate, in an action raised by the other children against the intromitter, after an interval of thirteen years, the Court would not require him to account, because the "reasonable presumption" was, that he had properly applied the funds (*d*). Again, where a domestic servant had, during three years, intromitted with grain and rents received from his master's tenants; an action of accounting having been raised against his executor after a number of years (the servant having died in another person's employment), the Court would not require the defender to account for his ancestor's intromissions (*e*). And where the servant of a tavern keeper, having left his service, was called to account for his intromissions during a year, the Court would not hold him bound to do so; because, according to the custom of the business, such servants account every day, or at intervals of a few days (*f*). Thus, also, the colonel of a regiment of militia being sued by one of his captains for levy money, which he had received for distribution about thirty years before, was assoilzied unless non-payment were proved by his writ or oath; because the custom was to pay the officers their several shares without taking receipts (*g*).

§ 621. The ground of these decisions is, that the intromitter must be presumed to have accounted at the proper time. *E converso*, where a factor had received money to be lent out on security,

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(*b*) Condie *v.* Peddie, 1848, 10 D., 941—See also Stuart *v.* Maconochie, 1836, 14 S., 412.

(*c*) L. Saultoun *v.* Fraser, 1722, M., 11,425.

(*d*) Wilsons *v.* Wilson, 1783, M., 11,646. The parties were in humble life.

(*e*) Irvine *v.* Falconer, 1671, M., 11,424—Morison *v.* Bruce, there cited.

(*f*) Couts *v.* Couts, 1636, M., 11,423—Abercromby *v.* Achison, 1676, M., 12,708.

(*g*) Dundas *v.* Holborn, 1678, 2 B. Sup., 223; S. C., 3 ib., 217—Cleilland *v.* Bonar, 1669, 2 ib., 455.

but had retained it in his hands for a number of years, and charged himself with interest upon it, the Court, in an action raised thirty years after the last of these entries, held that the factor must show how the debt had been discharged (*h*).

§ 622. A striking instance of presumed payment occurs in regard to duties and casualties which were payable by a vassal to his superior before receiving a charter or precept renewing the investiture. The circumstance of the superior granting the renewal without reserving his right to these claims, does not raise a presumption of payment, which may be overcome by the vassal's writ or oath, as was at one time supposed (*i*),—but implies an absolute discharge of the superior's claim, whether the question arises with the vassal's heir or with his singular successor (*k*). But this rule does not apply to the Crown, which ought not to suffer for the negligence of its officers (*l*); and it seems not to affect a subject-superior granting a renewal in obedience to a charge by the vassal (*m*). In other cases the implied discharge may be excluded by a reservation in the charter; but not by the clause of ordinary style, "*salvo jure cujuslibet*" (*n*).

In like manner, a disposition of a superiority by the superior to the vassal imports a discharge or assignation of any feu-duties or casualties which were outstanding at its date, partly on the ground of presumed payment, and partly because *accessorium sequitur principale* (*o*).

§ 623. It will be seen from the cases noted in the preceding sections that the law as to presumed payment was matured by the Court before the introduction of trials by jury in civil causes. Yet as the question is one of fact, it may be remitted to the latter tribunal (*p*); the previous cases being used as guides to the judge in directing the jury upon the strength of circumstantial proof which they should require, and not as precedents in point of law. In the trial of such an issue direct parole proof of payment is admissible; but the jury will be cautioned to decide upon the real evidence,

(*h*) Cairns *v.* Gairoch's Crs., 1747, M., 11,389. (*i*) See Arbuthnot *v.* Rait, 1680, M., 11,385—Ayton *v.* Duncan, 1676, M., 6464—Duff Feud. Con., 225.

(*k*) L. Wedderburn *v.* Nisbet, 1612, M., 6413; 6322—E. Cassilis *v.* Bargeny, 1682, M., 6414—Maxwell *v.* Falconer, 1686, M., 6514—Gibson *v.* Scott, 1739, M., 6500—Glasgow Tailors *v.* Blaikie, 1851, 13 D., 1073—Ersk., 2, 3, 23; ib., 2, 5, 46—Duff, *supra*. See also Erskine *v.* Hamilton, 1713, M., 6515. (*l*) See L. Haltoun *v.* E. Northesk, 1672, M., 6506—L. Coldingknows *v.* Crosbie, 1611, M., 6506.

(*m*) Ersk., 2, 5, 46—Glasgow Hospital *v.* Campbell, 1664, M., 6419.

(*n*) Glasgow Tailors *v.* Blaikie, *supra*. (*o*) E. Argyle *v.* M'Donald, 1676, M., 6323. (*p*) Seath *v.* Taylor, 1848, 10 D., 377.

rather than on the recollection of the witnesses; as such matters are not likely to be accurately observed or remembered by any but the parties concerned, whose evidence (except when it is to their own prejudice) is not trustworthy (*r*).

CHAPTER XVII.—PROOF OF RENUNCIATION OF RIGHTS AND OBLIGATIONS CONSTITUTED BY WRITING.

§ 624. The renunciation of a right or obligation constituted by writing may be proved by writ or oath on reference (*a*). As to proving it by parole, the same distinction between direct and indirect proof occurs as in proving payment of written obligations. On the one hand, the renunciation of the obligation or right cannot be established by witnesses deponing merely to a verbal abandonment (*b*); because, as already observed, a written obligation usually implies a written discharge, and witnesses are apt to mistake the terms of the renunciation, some important condition or counter-part of which may have either escaped their observation or been forgotten. This rule has been applied to the renunciation of a decree-arbitral (*c*), of a written lease (*d*), a decree of removal (*e*), an obligation in a feu-charter binding the vassal not to build ale-houses on the feu (*f*), and the like (*g*).[1]

§ 625. On the other hand, the renunciation of a right or obligation, although constituted by writing, may often be proved by circumstances almost as clearly as by the party's writ or oath on reference. Such evidence of the fact, therefore, is admitted, but with considerable caution (*h*); and if the case is before a jury, there

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(*r*) See a similar class of cases noticed *supra*, § 168, *et seq.* (*a*) Ersk., 3, 4, 8—Tait, Ev., 325—*Supra*, §§ 240, 241. (*b*) Ersk., *supra*—Tait, *supra*. See § 162. (*c*) Ker *v.* Skedden, 1787, Elch., "*Locus penitentiae*," No. 3.

(*d*) L. Craigmiller *v.* Chalmers, 1639, M., 12,308. (*e*) Countess of Argyle *v.* Sheriff of Moray, 1583, M., 12,300—Hunter *v.* Dun, 1809, Hume D., 584.

(*f*) Scott *v.* Cairns, 1830, 9 S., 247. (*g*) Master of Hailes *v.* Abbot of Newbottil, 1534, M., 12,298—L. Shaw *v.* Palmer, 1605, M., 12,301—Brody *v.* Cromarty's Crs., 1688, M., 12,328—Law *v.* Gibsone, 1835, 13 S., 396—Cases noted in § 162, *et seq.*

(*h*) Baillie *v.* Fraser, 1853, 15 D., 747—Geddes *v.* Wallace, 1820, 2 Bligh, 270—*Supra*, § 163.

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[1] *Supra*, § 167, note [11].

should be a direction from the judge, that unless the proof clearly establishes the fact of abandonment, effect ought not to be given to it (*i*). What strength of circumstantial proof ought to be held sufficient must depend on the characters of the right and document, and the mutual position of the parties; upon which points some illustrative cases have been mentioned in previous chapters (*k*).

§ 626. When there is circumstantial proof of renunciation, direct parole evidence of the fact will also be received; but little reliance should be placed on it, except where the witness is one of the parties deponing to his own prejudice.

CHAPTER XVIII.—PROOF OF RENUNCIATION OF RIGHTS AND OBLIGATIONS NOT CONSTITUTED BY WRITING.

§ 627. The renunciation of rights and obligations constituted verbally may be proved by writ or oath of party, or by facts and circumstances (*a*). And if the verbal constitution and abandonment occurred on the same occasion, both of them may be proved by the same evidence (*b*). Where, however, the renunciation occurred *ex intervallo* of the constitution of the obligation, it seems not to be proveable by bare testimony to the oral abandonment, unless the amount is within £100 Scots (*c*). Mr Erskine, indeed, observes that "an obligation which is constituted verbally may be extinguished by a verbal declaration of the creditor that he passes from it." And from the context the learned author seems to have meant that the declaration might be proved by parole; for he observes immediately afterwards, "but debts formed by writing cannot be extinguished without either the creditor's oath, or a written acknowledgment signed by him (*d*)." As, however, such a rule would admit parole of the renunciation of obligations which

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(*i*) See Craig *v.* Budge, 1823, 3 Mur., 320—M'Intosh *v.* M'Tavish, 1828, 6 S., 992—Law *v.* Gibsone, *supra.* (*k*) *Supra*, § 168, *et seq.*—§ 616, *et seq.*

(*a*) *Supra*, § 624–6. (*b*) See *supra*, § 612. Accordingly, if parole is admissible to prove the constitution of the obligation, the extinction, when forming part of the same *res gestae*, may be proved in the same way; and if the obligation is proved by oath of party, the statement that it was renounced at the time is an intrinsic quality to the oath. (*c*) See *supra*, § 611—Tait, Ev, 339. (*d*) Ersk., 3, 4, 8.

could not be proved by parole (*e.g.*, a verbal promise to pay money), Mr Erskine may have had in view merely the solemnities requisite for an effectual renunciation, and not the mode of proving it. At all events there can be little doubt that the renunciation of a verbal obligation cannot, as a general rule, be proved by parole; for if payment, the usual and natural mode of extinction, requires writ or oath when the sum exceeds £100 Scots, parole ought not to be received to prove discharge beyond that amount, by the unusual mode of a gratuitous abandonment (*e*).

CHAPTER XIX.—PROOF OF FRAUD AND WRONG.

§ 628. One who commits a fraud or wrong will carefully avoid leaving written proof of it; and no reliance could be placed on his oath on reference; which, indeed, he would generally be entitled to withhold, on the ground that *nemo tenetur jurare in suam turpitudinem.* It follows, therefore, that witnesses must be admitted to prove fraud and wrong, otherwise it would most commonly escape detection (*a*). This rule is in every day observance in criminal Courts; where parole evidence, both direct and circumstantial, is admitted, whatever be the character or atrocity of the offence. It holds not less forcibly in civil causes; the evidence of witnesses being constantly received, even in contradiction of solemn deeds and judicial records, when challenged on the ground of fraud. The rules on this head are fully treated in previous chapters (*b*), and afterwards, in considering how far writings of different kinds are probative.

(*e*) Tait Ev., 339. (*a*) Stair, 4, 3, 2, (6)—Ersk., 4, 2, 21—1 Hume, 376—Glassford Ev., 242—Tait Ev., 311. (*b*) See *supra*, § 174, *et seq.*, as to admitting parole of fraud to contradict written evidence—and § 344, *et seq.*, and § 359, as to bills and indorsations challenged on the head of fraud.

CHAPTER XX.—PROOF OF WILLS AND LEGACIES.

§ 629. Writing is essential to the nomination of an executor (*c*). But legacies may be left verbally; and, if proved by parole, will be sustained to the amount of £100 Scots (£8 : 6 : 8 sterling), although the actual bequests exceeded that sum (*d*).[1] In one case where an executor-nominate was also residuary legatee, the Court sustained to their full amounts nuncupative legacies beyond £100 Scots, when proved by his oath on reference; because he was merely a trustee under a right *ex facie* absolute, and was therefore bound to administer the estate in terms of the deceased's directions (*e*).[2] But in a subsequent case where the executor, being next of kin, was sued to divide the estate between himself and two others, in terms of the testator's verbal directions; and where on a reference to his oath he deponed that the deceased had stated to him that such was his will, but that he (the deponent) had not consented to make the division, although he had not expressly refused; the Court found the claimants entitled only to £100 Scots each as nuncupative legacies (*f*). The ground of decision in this case seems to have been, that as the next of kin was entitled to the succession by law, a legacy informally constituted could not burden his right, except through his own express undertaking to pay it (*g*). But there is good ground for maintaining that, as the next of kin succeeds through the will of the deceased, implied from the absence of another nomination, he ought not to be permitted to defeat the testator's expressed and proved intention that his right should be a trust in so far as regarded the verbal legacies. This view is supported by the authority of Dirleton (*h*), Stewart (*i*), and Erskine (*k*),

(*c*) Stair, 3, 8, 84—Ersk., 3, 9, 7—Tait Ev., 224.

(*d*) Stair, *supra*, and 3, 8, 36—Ersk., *supra*—Tait, *supra*—Wallace *v.* Muir, 1629, M., 1350, 6847—Smiths *v.* Taylor, 1749, M., 6594; Elch., "Testament," No. 10, S. C.

(*e*) M'Phun *v.* Guthrie, 1738, M., 3857; 5 B. Sup., 208; Elch., "Legacy," No. 5, S. C. (*f*) Smiths *v.* Taylor, *supra*. (*g*) See Ivory's Note, 576, to Ersk., 3, 9, 7. (*h*) Dirleton's Doubts, *voce* "Legacy." (*i*) Stewart's Answ., *voce* "Legacy." (*k*) Ersk., 3, 9, 7—See also Tait Ev., 224.

[1] Kelly *v.* Kelly, 1861, 23 D., 703.

[2] It was held that an executor who was sole trustee, and to whom as such the whole estate of the truster was conveyed, had no right to one-third of the dead's part, under the act 1617, c. 14, although the bequest of the residue had failed by decease of the legatee; because, in that case he held as trustee for the truster's representatives; Lowndes *v.* Douglas, 1862, 24 D., 1391. Now, by the act 18 and 19 Vict., c. 23, § 8, the executor-nominate has no right to any portion of the dead's part.

who lay down that verbal legacies beyond £100 Scots may be constituted verbally, and may be proved by the oath of the executor or next of kin.

§ 630. According to Dirleton (*l*), and Erskine (*m*), a universal legacy may be nuncupative, and will be effectual, if proved by the oath of the next of kin. But Stewart thinks that writing is essential to its constitution (*n*).

§ 631. A nuncupative legacy, if expressly left, will be effectual, although the testator directed that it should be committed to writing (*o*). But merely giving verbal directions to a person to prepare a will containing certain bequests does not import nuncupative legacies to these persons; because it is not a final expression of intention (*p*). And an informal testament will not be sustained as a verbal bequest of legacies of £100 Scots to the persons favoured by it (*r*).

§ 632. A *mortis causa* donation may be made without writ, however valuable the subject may be (*s*). It has not been settled whether it may be proved by parole, or only by the executor's writ or oath.[3]

§ 633. It was held in an old case that a nuncupative will made and confirmed in England, where such wills are valid, is not effectual to carry moveables in this country (*t*). But this decision, although adopted by Lord Stair (*u*), and Mr Erskine (*x*), is thought to be erroneous; as an executor, formally appointed according to the law of the deceased's domicile, is entitled to his moveable estate wherever situated (*y*).

(*l*) Dirl. Doubts, *supra*. (*m*) Ersk., 3, 9, 7. (*n*) Stew. Answ., *supra*.

(*o*) Mitchell *v.* Pinkerton, 1744, Elch., "Legacy," No. 13. (*p*) Mitchell *v.* Pinkerton, *supra*—Macfarquhar *v.* Calder, 1779, M., 3600, as mentioned in note * to Ivory's Ersk., 3, 9, 7—Monro *v.* Coutts, 1813, 1 Dow, 437—Stainton *v.* Stainton, 1828, 6 S., 363—Walker *v.* Steele, 1825, 4 S., 323. (*r*) Moncrieff *v.* Monypenny, 1711, M., 13,307; affd., Rob., 26. But see *contra* Hopkins *v.* D. Athol, 1728, M., 15,940; noticed *infra*, § 669. (*s*) Mitchell *v.* Wright, 1759, M., 8082.

(*t*) Shaw *v.* Lewis, 1665, M., 4494. (*u*) Stair, 3, 8, 35. (*x*) Ersk., 3, 2, 41. (*y*) 2 Bell's Com., 683—Brodie's Ed. of Stair, 10, note A—Hog *v.* Hog, 1791, M., 4619, affd. on appeal—Durie *v.* Coutts, 1791, M., 4624—Brack *v.* Hogg, 1827, 6 S., 113; affd., 5 W. S., 61—Ker *v.* Lady Ker's Tr., 1829, 7 S., 454—Marchioness of Hastings *v.* Exec. of M. Hastings, 1852, 14 D., 489. See on international questions regarding deeds, Part ii, b. ii, t. 1, c. 12.

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[3] A party placed money in a bank and took a deposit-receipt, payable to himself and his wife, and the longest liver of them; it was held that the deposit-receipt, being neither holograph of the husband nor probative, did not constitute a legacy to the wife; Cuthill *v.* Burns, 1862, 24 D., 849.

CHAPTER XXI.—PROOF OF JUDICIAL ACTS AND DECREES.

§ 634. Acts and decrees of Courts of Law can be proved only by the signed minutes of Court, or by regular extracts formally authenticated (*a*),—and not by the depositions of the judge, clerk of Court, members of inquest, or other witnesses, however respectable (*b*). This rule holds even where the matter arises incidentally in a cause; as did objections under the former law to witnesses on the ground of infamy (*c*).

If the record has been lost or destroyed, it may be restored by means of an action of proving the tenor; in which parole evidence will be admitted (*d*).

How far judicial records are probative, as well as the competency of parole to contradict, add to, or explain them, is considered elsewhere (*e*).

Witnesses have been admitted to prove that a sum beyond £100 Scots had been consigned in Court in implement of an order to that effect (*f*). But the decisions on the point (the precise grounds of which are not reported) are more than questionable.

(*a*) See on judicial records and extracts, Part ii, b. ii, t. 2, c. 5, and t. 3, c. 1.

(*b*) Poor Wife of Broughton *v.* M'Call, 1542, M., 12,264; 1 B. Sup., 114—Lauder *v.* Mowat, 1628, 1 B. Sup., 58, 262—Dickson *v.* Ponton, 1824, 3 Mur., 440—Greig *v.* Edmonstone, 1826, 4 ib., 70—Smith *v.* Robertson, 1832, 10 S., 829—Fraser, 1839, 2 Sw., 436. (*c*) Dean's case, 1729, 2 Hume, 355—Miller *v.* Moffat, 1820, 2 Mur., 223—Thomson, 1839, Bell's Notes, 256. (*d*) See on the action of proving the tenor, Part ii, b. ii, t. 3, c. 5. (*e*) See *supra*, § 48, *et seq.*, and the chapters on judicial records and extracts, Part ii, b. ii, t. 2, c. 5, and t. 3, c. 1. (*f*) Tr. for Rae's Crs. *v.* Gordon, 1794, M., 12,367—Applegirth *v.* Lockerby, 1671, M., 12,706.

END OF PART FIRST.

PART SECOND.

RULES APPLICABLE TO THE DIFFERENT INSTRUMENTS OF EVIDENCE.

THE Instruments of Evidence—that is, the sources from which Courts of Law derive information on matters of fact—are very numerous; as are also the rules regarding their admissibility and effect. These rules will be treated under the four following heads:—

I. WRITTEN EVIDENCE.

II. STATEMENTS AND OATHS OF THE PARTIES NOT BEING ADDUCED AS WITNESSES.

III. TESTIMONY, OR THE EVIDENCE OF PERSONS ADDUCED AS WITNESSES.

IV. REAL EVIDENCE, OR EVIDENCE DERIVED FROM THINGS.

BOOK FIRST.

OF WRITTEN EVIDENCE.

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§ 635. Written evidence, in a classification of the instruments of evidence, comprehends those writings which are prepared for the purpose of preserving written memorials of facts and transactions. It embraces two great classes of writings, namely, those which are prepared by the parties for the purpose of defining the nature and import of their transactions,—and those which are prepared by public officers, as the pre-appointed record of matters which concern the community. The latter class includes those writings of a *quasi* public character ; which, relating to private transactions, but affecting the interests of persons who are not parties to them, are committed by law to official care.

The rules regarding the first of these classes of writings will now be considered.

TITLE I.

OF PRIVATE WRITINGS.

CHAPTER I.—OF THEIR AUTHENTICATION.

§ 636. The most ancient mode of authenticating deeds in Scotland was by the sign of the cross, which both betokened a solemn adjuration to implement the written contract, and was viewed as an amulet for preserving it from injury. This universal symbol was succeeded by seals bearing the coats of arms or initials of the parties, and sometimes having "monograms," or devices in which the letters of their names were fancifully combined, and were usually united with the name of Christ, or of some tutelary saint. The presence of witnesses was not essential to the authentication; but if any were in attendance when the deed was executed, the notary inserted their names, with the prefix "*his testibus;*" and he was especially careful in doing so if they were persons of note, whether lords or ladies. The authenticity of the deed was ascertained by comparing the wax impression with the party's signet; and if the granter admitted that the impression was genuine, but averred that it had not been affixed by him, he had to bear the "skaith," on account of his "evil keeping" of his seal (*a*).

§ 637. A mode of authentication so rude and simple gave rise to fraud. The evil, and a partial remedy for it, appear in the act 1540, cap. 117, by which "it is statute and ordained, that because mennis seales may of adventure be tint, quhairthrow great hurt may be genered to them that awe (own) the samin: And that mennis seales may be feinzied or put to writinges, after their decease, in hurte and prejudice of our soverain lord's lieges: That

(*a*) 1 Ross Lec., 128, *et seq.*—Reg. Mag., L. 3, c. 8. § 4, 5, 7—Mack. Obs. on 7 Parl. James V (1540), c. 117—Ersk., 3, 2, 7—Duff Feud. Con., 4.

therefore na faith be given in time cumming to ony obligation, band, or other writing under ane seale, without the subscription of him that awe the samen and witnesse (*b*); or else, gif the partie cannot write, with the subscription of ane notar thereto." This act was observed with regard to the subscription of the party, or of a notary in his name; but it did not secure authentication by the witnesses (*c*).

§ 638. Shortly afterwards came the act 1555, c. 29; which ordained, on the pain of nullity, that all reversions, and bonds and obligations, for making, sealing, and delivery of reversions, should be sealed and subscribed by the granter, and "gif he cannot subscrive, to subscrive the same with his hand led at the pen be ane notar."

§ 639. This mode of notarial authentication was evidently inadequate. It was altered by the act 1579, cap. 80, which still regulates the subscription of deeds by persons who cannot write. By this act "it is statute and ordained that all contractes, obligationes, reversiones, assignationes and discharges of reversiones, or eiks thereto, and generallie all writtes emporting heritabil titil, or utheris bondes and obligationes of great importance, to be maid in time cumming, sall be subscrived and seilled be the principal parties, gif they can subscrive, utherwise be twa famous notars befoir four famous witnesses, denominat be their special dwelling places, or sum other evident takens, that the witnesses may be knawen, being present at that time, utherwise the saidis writs to mak na faith."

§ 640. Ere long, sealing was found to be unnecessary in deeds which were formally subscribed. It was therefore dispensed with by the act 1584, cap. 4, as a requisite to any deed entered in a public register under a consent to registration. And after the passing of this statute sealing fell generally into desuetude; a change which, ere Mackenzie's time (1686), had become "warranted by uncontroverted custom" (*d*).

§ 641. A new security for the authenticity of deeds was introduced by the act 1593, c. 179; which, on the preamble of the increase of falsity, especially by the bodies of deeds being written by "sik persones as ar not commounly knawen, and are not commoun

(*b*) The word "witnesse" is used in the plural; see Duff Feud. Con., 6—Thomson's ed. of Statutes, vol. 2., p. 377, cap. 37. (*c*) Ersk., 3, 2, 7—1 Ross Lec., 128 —Duff Feud Con., 6. (*d*) Mack., Obs. on 7 Parl. James V (1540), c. 117, and on 6 Parl. James VI (1579), c. 80—Ersk., 3, 2, 7.

notaries, nor bruikes na commoun office, as writers within this realme; and, gif the writer were knawn the samin wald give great light to the tryall of the truth or the falsed of the said writ and evident,"—"decernis and declaris that all original chartoures, contractes, obligationes, reversiones, assignationes, and all other writtes evidentes to be maid hereafter, sall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocesie, and other denomination of the writer of the body of the foresaid original writtes and evidentes; utherwise the same to make na faith in judgment, nor outwith in time cumming: And to begin upon the first daye of November next to cum."

§ 642. Notwithstanding these acts, the Court did not visit with nullity the omission of the statutory requisites, but allowed both the subscriptions and the designations of the witnesses, and the name and designation of the writer to be supplied by a condescendence and proof. This occasioned the passing of the act 1681, c. 5, one of the most important statutes in the law of Scotland. Its terms are:—

"Our soveraign Lord, considering that by the custom introduced when writting was not so ordinary, witnesses insert in writs, although not subscribing, are probative witnesses, and by their forgetfulness may easily disown their being witnesses. For remeed whereof, his Majestie, with advice and consent of the estates of Parliament, doth enact and declare, that only subscribing witnesses in writs to be subscribed by any partie hereafter, shall be probative, and not the witnesses insert not subscribing: And that all such writs to be subscribed hereafter, wherein the writter and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writter or the designation of the writter and witnesses: And it is further statute and declared that no witness shall subscribe as witness to any partie's subscription, unless he then know that partie, and saw him subscribe, or saw, or heard him give warrand to a nottar, or nottars, to subscribe for him, and in evidence thereof, touch the nottar's pen, or that the partie did at the time of the witnesses subscribing acknowledge his subscription; otherwise the saids witnesses shall be repute and punished as accessorie to forgerie. And seeing writting is now so ordinary, his Majestie, with consent foresaid, doth enact and declare that no witnesses but subscribing witnesses shall be probative in instruments of seising, instruments of resignation *ad remanentiam*, instruments of intimation of assignations, translations, or retrocessions, to bands,

contracts, or other writs; which shall happen to be subscribed in any time hereafter. . . . . And that in all the saids cases, the witnesses be designed in the bodie of the writ, instrument, or execution respective, otherwise the same shall be null and void, and make no faith in judgment, nor outwith."

§ 643. Originally deeds requiring more than one sheet were written on rolls of paper or parchment, the different portions of which were pasted together, and were generally signed on the margin, across the joinings. This inconvenient form was altered by the act 1696, c. 15; which allows (without requiring) deeds to be written bookwise, under certain regulations for authenticating the several sheets. It is in these terms—"Our Sovereign Lord, understanding the great trouble and inconveniency the lieges are put to in finding out clauses and passages in long contracts, decreets, dispositions, extracts, transumpts, and other securities, consisting of many sheets battered together, which must be either folded or rolled up: Doth, for remeid thereof, with advice and consent of the estates of Parliament, statute and ordain that it shall be free hereafter for any person who hath any contract, decreet, disposition, or other security above mentioned to write, to choose whether he will have the same written in sheets battered together as formerly, or to have them written by way of book, in leafs of paper, either in folio or quarto; providing that, if they be written bookways, every page be marked by the number, first, second, &c., and signed as the margins were before, and that the end of the last page make mention how many pages are therein contained; in which page only witnesses are to sign in writs and securities where witnesses are required by law; and which writs and securities being written bookways, marked and signed as said is, his Majesty, with consent foresaid, declares to be as valid and formal as if they were written on several sheets battered together, and signed on the margin, according to the present custom."

These are the statutes which regulate the authentication of private deeds. The requisites which they introduce, along with the rules of common law on the same subject, will now be considered in detail.

I. *Of Naming and Designing the Parties.*

§ 644. Every deed ought to describe the parties accurately by

their full names and designations or additions; because law cannot give effect to a writing in which either the granter or the grantee is uncertain. Mr Erskine lays down that a deed is ineffectual, if the parties are not so described in it as to be distinguished from all others (*e*). But this is too strongly stated; because where there are several persons of the same name and business or the like in one place, a deed granted by or to one of them will be sustained, provided it can be shown to which individual the description applies (*f*). Even errors in the name and designation of the grantee of a deed have been overlooked, where enough was left to identify him (*g*). Every such case, indeed, is one of identification, and may be cleared up by proof extrinsic, as well as intrinsic, to the deed (*h*).[1]

The practical rule, however, is to name and design the parties fully and precisely. The granter should be set forth at the commencement, and the grantee in the dispositive or obligatory clause. But there is no strict rule on this point; insomuch that a wife's consent to her husband's will was sustained, although she was only mentioned in the testing clause (*i*).

II. *Of Deeds containing Blanks.*

§ 645. Deeds which contain blanks in essential parts are ineffectual at common law; because the duty of a Court is to construe and give effect to a party's expressed intention, not to construct for him a deed which he failed to make. What is a blank *in substantialibus* depends on the purpose and terms of each deed.

§ 646. Of course the subject meant to be conveyed by a disposition, and the sum to be due under a bond, are essential (*k*). But if the deed was completed in these particulars when it was delivered, it is valid, although it was blank when subscribed (*l*). Again,

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(*e*) Ersk., 3, 2, 6—See also Tait Ev., 56. (*f*) See *supra*, § 213, *et seq.*

(*g*) See *supra*, § 208, *et seq.* (*h*) This subject is fully treated *supra*, §§ 195, 203, 205, *et seq.* (*i*) Johnstone *v.* Coldstream, 1843, 5 D., 1297. See also Weirs *v.* Ralston, 22d June 1813, F. C. (*k*) But there is good ground for challenging (with Prof. More, Notes, p. 104, 407) the authority of Coult *v.* Angus, 1794, M., 17,040, Elch., "Cautioner," No. 18, where the omission to repeat the sum in the obligatory clause of a bond of corroboration was held to be fatal, although the amount was set forth distinctly in the narrative, and by reference to the bond which was meant to be corroborated. (*l*) Baillie *v.* Scott, 1828, 6 S., 1016.

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[1] See remarks by the Lord Justice-Clerk (Inglis) in Joel *v.* Gill, 1859, 22 D., 12.

where a deed is granted as a trust for some special purpose, and not to the grantee simply, blanks in declaring the trust purposes may be fatal. Thus a trust-deed which directed the trustees to invest and accumulate £6000 till it should reach the sum of £ , and then to lay it out in erecting and maintaining an hospital in Montrose, similar to Robert Gordon's hospital in Aberdeen, for maintaining, clothing, and educating boys, was held by the House of Lords to be inept (*m*). Yet if a deed of this kind confers on the trustees or any other person power to fill in the items left blank, it will be effectual (*n*).

§ 647. In one case a trust-deed by a lady under voluntary interdiction directed her trustees to pay her during her life such an annuity as they should think reasonable, with power to them to increase or diminish it as they should see cause, but the amount not to exceed £ in any one year; which allowance was to be continued to her heir, subject to increase and diminution as aforesaid, but not to exceed £ yearly. Another purpose of the trust was for establishing a fund for paying off the truster's debts, and making provision to her younger children, whom failing to their lawful issue, not exceeding the sum of £ to each child or issue, with power to the trustees to sell the trust property; and if the price of it when sold should fall short of paying the debts and provisions, and leaving a reversion of double the amount of the said sum of £ for the heir, then the provisions should suffer a proportional diminution, to the effect that the heir should always have a reversion or provision double of that falling to each of the younger children. The deed also directed that the free proceeds of the truster's moveable estate should be divided in the same proportions. On the heritable estate being sold, the children of the heir-at-law claimed the whole residue as heritable property. The Court were much divided as to whether the trust-deed was effectual, and ultimately held that it was, and that the trustees had power, under sight of the Court, to fix the provisions of the younger children (*o*). This decision certainly went far enough, for the sum which it found the younger children entitled to may have greatly exceeded that which the truster intended to insert in the blank. In a subsequent

(*m*) Ewen *v.* Ewen's Tr., 1830, 4 W. S., 346; reversing 6 S., 479. See also Pentland *v.* Hare, 1829, 7 S., 640, *infra*, § 658 (*f*). (*n*) Hill *v.* Burns, 1824, 3 S., 389; affirmed 2 W. S., 80—Crichton *v.* Grierson, 1826, 4 S., 553; affirmed 3 W. S., 329—per Lord Wynford in Ewen *v.* Ewen's Tr., *supra*—Murray *v.* Fleming, 1749, M., 4075—Snodgrass *v.* Buchanan, 16th Dec. 1806, M., "Service of heirs," Appx., No. 1—Brown's Tr. *v.* his relations, 1762, M., 2318. (*o*) Stewart *v.* Stewart, 26th Nov. 1813, F. C. But this case was decided before Ewen *v.* Ewen's Tr., *supra* (*m*).

case a letter of guarantee to the amount of £ was sustained, as not being blank *in substantialibus*, but containing a proposed limitation which had been departed from (*p*).

§ 648. An exception to the rule that a writing must be completed *in essentialibus* occurs in regard to bills. As the sum which can be filled into the blank is limited by the stamp, a person who affixes his name to a "skeleton bill" is held to render himself liable for any sum which may be filled in above his signature, and which the stamp will carry (*r*).

§ 649. Formerly bonds used to be executed blank in the creditor's name, and to be completed by the last holder inserting his own name before doing diligence. Such bonds passed from hand to hand without assignation; they were secure from the plea of compensation; and their proceeds could not be attached by diligence. In this way they afforded facilities for fraudulent preferences by insolvent persons (*t*); and they were used for eluding the law against deathbed alienations. Accordingly, after having been for some time discountenanced by the Court, they were prohibited by the act 1696, cap. 25, "anent blank bonds and trusts."

§ 650. This statute, on the preamble that "the subscribing of bonds, assignations, and dispositions, and other deeds blank in the name of the person in whose favours they are granted, &c., are occasions of fraud, as also of many pleas and contentions," statuted and ordained that "no bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons' name in whose favours they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, certifying that all writs otherwise subscribed and delivered blank as said is shall be declared null"—"Declaring that this act shall not extend to the indorsation of bills of exchange or the notes of any trading company."

§ 651. This act applies to trust-deeds blank in the names of the trustees (*u*)[2]; and to deeds of entail executed before the names

(*p*) Buchanan *v.* Dickie, 1828, 6 S., 986. (*r*) Grassick *v.* Farquharson, 1846, 8 D., 1073, and cases there cited—Lyon *v.* Butter, 1841, 4 D., 178—Smith *v.* Taylor, 1824, 2 S., 755. See *infra*, § 651, (*a*), and § 796, *et seq.*

(*t*) Stair, 3, 1, 5—Ersk., 3, 2, 6—M., *voce*, "Blank Bonds." (*u*) Pentland *v.* Hare, 1829, 7 S., 640. But a blank in the names of some of the trustees is not fatal;

[2] This can hardly be regarded as settled by the decision referred to. Perhaps the beneficiaries may be regarded as the true disponees; see *infra*, § 874, note.

of the heirs were filled in (*x*). But a blank in the name of a postponed heir does not annul an entail as regards heirs nominated before him (*y*). At one time bills signed blank in the payee's name were held to come under the act 1696, cap. 25 (*z*). They have for a long time been sustained on account of the exigencies of trade and the custom to use "skeleton bills," and because bills come within the general law-merchant rather than the municipal rules of individual states (*a*). On similar grounds, and by the words of the exceptional clause in the statute, documents binding merchants, manufacturers, and "trading companies" to deliver certain goods to the holder are effectual, although the name of the grantee is not inserted (*b*).[3]

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see E. Traquair *v.* Henderson, 1822, 1 S., 527—Robertson *v.* Ogilvie's Tr., 1844, 7 D., 236—Richardson *v.* Biggar, 1845, 8 D., 315. (*x*) Abernethie *v.* Forbes, 1835, 13 S., 263—Kennedy *v.* Arbuthnot, 1722, M., 1681; 1 Ross Ca., 566, S. C.

(*y*) Abernethie *v.* Forbes, *supra*. See Richardson *v.* Biggar, *supra*.

(*z*) Ersk., 3, 2, 28—Thomson on Bills, 52. (*a*) 1 Bell's Com., 390—Fair *v.* Cranston, 1801, M., 1677—Little and Co. *v.* Muir, 23d February 1808, 1 Bell's Com., 390—Still and Co. *v.* Gall, 1805, Hume D., 53—Drummond *v.* Campbell, 1813, Hume D., 71—Smith *v.* Taylor, 1824, 2 S., 755—Lyon *v.* Butter, 1841, 4 D., 178—Grassick *v.* Farquharson, 1846, 8 D., 1073. See § 648 (*r*). (*b*) Bovil *v.* Dixon, 1854, 16 D., 619. See also Mackenzie *v.* Dunlop, 1853, 16 D., 129; and Dimmack, Thomson, & Firmstone *v.* Dixon *in pendente*, July 1854.

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[3] Although written obligations to deliver goods to the bearer are not invalid under the act 1696, c. 25, they would probably be held ineffectual at common law. In Bovil *v.* Dixon the pursuer was the holder of a note by which the defender, an ironmaster, bound himself to deliver 1000 tons of pig iron to the bearer. The defender refused to deliver the iron, because the original purchaser, from whom the pursuer had bought the note, had not paid the price, and was bankrupt; and the defender pleaded that he was entitled to retain the goods in security of the price. He argued, in the Outer House, that the document was invalid under the act 1696, c. 25; this plea was repelled by Lord Rutherfurd, and was not renewed in the Inner House, where the validity of the document seems to have been taken for granted, and where the case was decided in favour of the pursuer, on the ground that the granter could not plead retention against a *bona fide* and onerous holder. In Mackenzie *v.* Dunlop, *supra*, in which the pursuer was holder of a similar note granted by the defender, the point discussed was whether the defender was bound to deliver iron of a particular description—he admitted his obligation to deliver iron, but a question was raised as to the kind of iron to be delivered. But in Dimmack, Thomson and Firmstone *v.* Dixon, where the document founded on was of the same kind, the scope and effect of the act 1696, c. 25, were very carefully considered by the whole Court, and all the judges were of opinion that the document was not invalid under that act. It was thought that the act regarded mainly documents requiring formal authentication; and, besides, that a document payable to the bearer was not blank in the name of the creditor, because there was no blank left for the creditor's name, and because the creditor was sufficiently described and identified as the bearer of the document; the document was complete when it was issued, whereas

§ 652. A deed will not be held blank in the grantee's name on account of the granter not specifying the individual whom he means

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the writings referred to in the act were writings meant to be completed afterwards by filling in the name of the grantee. Lord Curriehill thought that the act did not apply; because it was one of those statutes which render the observance of solemnities necessary in framing written instruments, from the operation of which enactments his Lordship held that all writings granted in mercantile transactions were exempt. Others of the judges, however, were of opinion that the question in the case was not as to the form of execution of the document, and that, except as regarded form of execution, writings *in re mercatoria* were in no different position from other writings. But while the Court were unanimous in holding that the act 1696 did not apply, there was considerable difference of opinion as to the validity of the document at common law. The majority of the Court saw no illegality in the document. But Lords Ivory, Deas and Neaves thought a document of the kind invalid; and observed that if it were sustained, such notes might be issued in every trade, and a species of currency created which the law did not recognise; Dimmack, 1856, 18 D., 428.

The case of Dimmack was compromised; but Bovil *v.* Dixon went to the House of Lords, where it was again decided in favour of the pursuer, but on the special ground that, by the correspondence and dealings which had taken place between the pursuer and the defender, the defender had come under obligation to deliver the iron to the pursuer. But the principle of the judgment in the Court of Session was not affirmed in the House of Lords. On the contrary, the Lord Chancellor (Cranworth) took occasion to say that he held the document to be invalid. His Lordship observed that the effect of such a document, if valid, was to give a floating right of action to any person who might become possessed of it, which could not be tolerated by the law, either of Scotland or England. The only cases in which such an action could be sustained were those of bills of exchange and promissory-notes, depending on the law-merchant in the case of bills of exchange, and on the statute of 12 Geo. III, c. 72, § 36, in the case of promissory-notes; no evidence was given of mercantile usage as to such documents. The rule preventing such actions was by no means of a technical nature, but a rule founded on extremely good sense. In Scotland as well as in England it was a good defence to show illegality of consideration, such as *turpis causa;* it was the policy of the law to preserve such defences intact. But this principle would be entirely defeated if a contracting party could make a floating contract enforceable by bearer, who might be a stranger to the contract. Bills of exchange had been made an exception for the convenience of trade, but that exception was not to be extended; that it required a statute to make promissory-notes transferable by indorsation, showed that there was no such general privilege of such documents at common law. Independently of the law-merchant and of positive statute, within neither of which classes these scrip notes were included, the law did not, either in Scotland or in England, enable any man, by a written engagement, to give a floating right of action at the suit of any one into whose hands the writing might come, and who might thus acquire a right of action better than the right of him under whom he derived his title.—Bovil *v.* Dixon, 1856, 3 Macqueen, 1, 13. This judgment in the House of Lords was subsequent to the judgment in the Court of Session in the case of Dimmack. In a later case, iron-masters granted a written obligation to deliver certain tons of iron, payment being acknowledged by the document, to the order of a party named; he blank indorsed this document, and the holder, a bank, sued the granters, who pleaded a counter claim against the person to whom they had originally sold the iron. The question was whether the right to demand delivery

to favour, provided he deputes another person to name him (c). Thus a disposition to the granter's wife in liferent, and any relation whom she might name in fee, was sustained in favour of the individual nominated by her (d); and a deed of settlement conveying heritage to G. B. and the heirs of his body or assignees, "whom failing, to such of my mother's relations as my friend M. shall appoint by a writing under her hand," was held effectual in favour of the persons whom she appointed (e).

§ 653. The peremptory injunction of the statute, that the names of the grantees be "either insert before or at the subscribing, or at least in presence of the same witnesses to the subscribing before the delivery," strikes at a deed which is filled up in compliance with the granter's directions contained in a separate writing, but without the presence of the witnesses. Thus where the friends of a Scottish proprietor residing in India transmitted to him both a trust-deed, in which the names of the trustees and the trust purposes were filled up, and a skeleton deed in the same form, but blank in these particulars; and where the blank copy was signed by the granter and returned with letters stating his approbation of its terms, but the other copy did not come to light; and where the conveyancer who had prepared the deeds filled into the skeleton copy the names and trust purposes which had been inserted in the duplicate, the Court held that the deed was ineffectual both by the act 1696 and at common law (f). Thus also where a deed of set-

(c) See *supra*, § 646. (d) Murray v. Fleming, 1749, M., 4075.

(e) Snodgrass v. Buchanan, 1806, M., "Service of Heirs," App., No. 1.

(f) Pentland v. Hare, 1829, 7 S., 640. The party founding on the deed was allowed an opportunity to prove the tenor of the missing duplicate; but he failed to do so.

of the iron was carried by the blank indorsation. The pursuer pleaded usage of trade; and Lord Handyside (Ordinary) found that an assignation was not necessary for its transference, but that, as a document *in re mercatoria*, it was transferable according to the usage and practice of trade. This interlocutor, which was pronounced before the judgment in the House of Lords in Bovil v. Dixon, was recalled *in hoc statu*. When the case was taken to the Inner House at a subsequent stage, it appeared to the Court that the document in question had not originated in a sale, but had been got up as the basis of a security, and thus could not be regarded as a writ *in re mercatoria*, and on that ground the Court held that it had not been duly transferred to the pursuers; the transmissibility of such a document by indorsation was therefore not decided; the remarks of the Lord Chancellor in Bovil v. Dixon, however, seem as applicable to such a document as to a written obligation to deliver goods to the bearer; Commercial Bank of Scotland v. Kinnaird, 1859, 21 D., 864; 31 Scot. Jur., 478. Bills of lading may be taken in favour of the bearer, and may be transferred by a blank indorsation; Bell's Prin., § 417—18 and 19 Vict., c. 111.

tlement destined certain estates to A B and the heirs of his body, whom failing to ; and the granter, five days after subscribing the deed, signed before a different set of witnesses a docquet which was appended to the deed, and which mentioned who the granter wished should be inserted as substitutes; and where the deed was completed accordingly, the Court held that it "had not been filled up in terms of the act 1696, and must therefore still be looked on as blank in the substitution;" but they sustained the docquet as an independent deed of substitution in favour of the person named in it (*g*).

In another case, where a deed of entail contained a destination to certain heirs, "whom failing to such other person or persons" as the granter should name by a writing under his hand; and where, on the day on which he signed the deed, and in his holograph letter transmitting it to his agent to be completed, the granter directed him to insert a certain name into the blank which had been left for it, and that was done accordingly,—the Court sustained the deed as effectual to the heirs standing before the heir so nominated, but waived deciding on the validity of his nomination (*h*). The point is attended with considerable difficulty.

§ 654. If ocular inspection shows that the grantee's name was originally blank (as where it is in a different handwriting from the rest of the deed), or if the testing clause mentions that such is the fact, without stating that the blank was filled up in terms of the act 1696, the party founding on the deed will have to prove that it was duly completed (*i*); and if the deed is challenged on the head of deathbed, he will require to show that it was completed while the granter was *in liege poustie* (*k*). But where the testing clause mentions that the blanks were filled up at subscribing or in presence of the instrumentary witnesses, before delivery, the deed is probative; and the challenger must bear the burden of proving that the statute was not observed (*l*).

(*g*) Kennedy *v.* Arbuthnot, 1722, M., 1681; 1 Ross Ca., 566, S. C. The substitute therefore acquired the estate indirectly through the heir-at-law of the previous grantee, instead of taking it directly under the principal deed. (*h*) Abernethie *v.* Forbes, 1835, 13 S., 263. (*i*) Donaldson *v.* Donaldson, 1749, M., 9080; 5 B. Sup., 286. But see Ersk., 3, 2, 6. The cases of Sinclair *v.* Sinclair, 1746, M., 11,559, and Ruddiman *v.* Merchant Maiden Hosp., 1746, M., 11,562, referred to by Erskine, related to writings dated before the act 1696. (*k*) Livingstone *v.* Nairn, 1702, M., 12,282 —Cairns *v.* Garrock's Crs., 1742, M., 1678. See Birnies *v.* L. Polmaise, 1678, M., 3242 —Pennycook *v.* Thomson, 1687, M., 3243. (*l*) Sinclair *v.* Sinclair, 1746, M., 11,559. See Johnstone *v.* Coldstream, 1843, 5 D., 1297.

III. *What part of the Deed should be Signed.*

§ 655. Deeds signed by the sovereign are superscribed with the royal sign-manual and subscribed by an officer of state. But in all deeds by subjects the proper place for authentication is at the foot of the writing; and when they consist of more than one page, each ought to be signed in this way. The act of authentication is not complete till the party has signed the last page; and, therefore, if he fails to do so, the deed is inchoate and null, although the failure arose from accident or weakness, and not from altered intention (*m*). Whether holograph writings unsubscribed are effectual is considered afterwards.

§ 656. The practice of subscribing before the testing clause is completed sometimes occasions difficulty in filling in that part of the deed above the signatures. In one case of a disposition of heritage executed by an illiterate person, where the testing clause was closely crowded and was written in a much smaller character than the rest of the deed; a part of it being parallel to, and a small part rather below, the granter's signature, although above those of the witnesses; and where some words of style in the clause were on erasure;—there being no doubt of the genuineness of the subscription and attestation, the Court sustained the deed (*n*).

§ 657. As already mentioned, deeds consisting of more than one sheet used to be written on rolls of paper or parchment, the several sheets being pasted together. They were subscribed for the purpose of authentication as completed deeds, and were signed across the joinings to prevent fraud by way of interpolation. But the want of sidescription (which was not a statutory solemnity) was overlooked, where fraud did not appear (*o*); and deeds by several persons have been sustained, where only one signed the margins (*p*). It was not unusual for such deeds to conclude with a clause authorising one of the parties to sidescribe as for the whole of them (*r*).[4]

(*m*) Hopkins *v.* D. Athol, 1728, M., 15,940—Dempster *v.* Willison, 1799, M., 16,947—Moncrieff *v.* Monypenny, 1710, M., 15,936; affd., Rob. Ap., 27—Right *v.* Price, 1779, 1 Doug., 241. See *infra*, § 669. (*n*) Dury *v.* Dury, 1753, M., 16,936; Elch., "Writ," No. 27, S. C. (*o*) Erak., 3, 2, 14—Tait, 70—Duff Feud. Con., 8—Ferguson *v.* Burnet, 1748, Elch., "Writ," No. 22—Dunbar *v.* M'Dowall, 1702, 4 B. Sup., 524—Sim *v.* Donaldson, 1708, M., 16,807, 16,713. *Contra*, Macdonald *v.* Macdonald, 1714, M., 16,808. (*p*) Ogilvie *v.* Findlater, 1674, M., 16,804—Paton's Crs., 1711, M., 16,807. (*r*) Sclater *v.* Clyne, 1831, 9 S., 248 (affd. on another

[4] See Galbraith *v.* Edinburgh and Glasgow Bank, House of Lords, 1859, 31 Sc. Jur. 425.

§ 658. The present shape of deeds was introduced by the act 1696, c. 15; which, after narrating the inconvenience of the old form, makes it "free for any person who hath any contract, decreet, disposition," &c., "to choose whether he will have the same written in sheets battered together as formerly, or to have them written by way of book," "providing (*inter alia*) that in the latter case every page be signed as the margins were before," only the last page being signed by the witnesses. Deeds written bookwise and authenticated in terms of the statute are declared as valid as those in the old form.

§ 659. The words "as the margins were before" have been read as limiting and explaining the general enactment, so that a deed written on several pages of one sheet is valid, although signed only on the last (*s*)[5]; and an execution was sustained which consisted of more than one sheet, one page (containing nothing material) not being signed by the messenger, and another not by the appraisers (*t*). Whether this rule of construction will protect a deed consisting of several sheets, but signed only once on each sheet, instead of on each page, has not been decided.

A deed consisting of several sheets, signed by a consenter only on the last page, is not binding upon him (*u*).

IV. *Of Subscription by persons who can write.*

§ 660. It has already been mentioned that in olden times persons unable to read or write authenticated deeds by a cross, and afterwards by a seal. The subsequent statutes upon the subject are confined to the *authentication* of deeds, leaving it to be determined upon the facts of each case, whether a deed bearing the legal solemnities was truly consented to and signed. They distinguish only two classes of persons, namely, those who can, and those who cannot, write. As the best authentication is the party's own subscription, the act 1540, cap. 117 (*x*), ordained all who could write to execute their deeds in that way; while it appointed those who could not write to use the hand of a notary. The act 1579, c. 80 (*y*), repeated the

point, 5 W. S., 625). (*s*) Smith *v.* Bank of Scotland, 4th July 1816, F. C.—Williamson *v.* Williamson, 1742, M., 16,933; 16,955; Elch., "Writ," No. 13, S. C.

(*t*) Peter *v.* Ross, 1795, M., 16,957. (*u*) Bothwells *v.* E. Home, 1747, M., 16,811. (*x*) Quoted *supra*, § 637. (*y*) Quoted *supra*, § 639.

[5] Robinson *v.* Wittemberg, 1860, 23 D., 181.

rule as to the former class, and required the latter to subscribe by two notaries before four witnesses.

§ 661. If a person can only sign his name, however rudely, he ought to authenticate his deeds with his own hand, although he may be unable to read them (*z*). Nay more, a blind person who can sign his name is one who can write in the sense of the statutes, and who ought to sign with his own hand (*a*); but, if he chooses, he may execute his deeds notarially (*b*). A blind person's deed executed in either form and properly attested, is probative; and, as afterwards noticed, it is not essential that the deed be read over to him before subscription (*c*).

§ 662. None of the statutes defines the term subscription, which is therefore regulated by custom and common law. Originally it was by a monogram, as already noticed (*d*).

A peer subscribes by his title without his christian name; using only his highest title, unless there be special occasion for signing by an inferior one (*e*). A peer's wife, who is not a peeress in her own right, subscribes by her husband's title, with her christian name or initials prefixed. Peeresses in their own right also generally sign in this way, although they may use their titles alone.

English and Irish bishops of the Established Church sign by their christian names or initials, prefixed to the names of their sees. But bishops of other churches, not having legal territories, have not this privilege (*f*).

The eldest sons of all peers except barons (although coming under the prohibition of the act 1672, noticed below) have by long custom been allowed to sign with their courtesy titles (*g*).

§ 663. All persons, except those above enumerated, ought to subscribe by their christian names or initials, with their surnames at length. The custom of calling landed proprietors by the names of

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(*z*) Wilson *v.* Raeburn, 1800, Hume D., 912. A subscription may be all written in capital letters; Crosbie *v.* Picken, 1750, M., 16,814; Elch., "Writ," No. 25.

(*a*) E. Fife *v.* E. Fife's Trustees, 1823, 1 Sh. Ap., 498, fully noted *infra*, § 685—Kerr *v.* Hotchkis, 1837, 15 S., 983—Coutts *v.* Straiton, 1681, M., 12,601; 6842—overruling Falconer *v.* Arbuthnot, 1751, M., 16,817; Elch., "Writ," No. 26.

(*b*) Reid *v.* Baxter, 1840, 13 S., 1063; 16 S., 273 and 994; affd., 1 Rob. App. Ca., 66. The docquet in this case merely stated that the granter "from defect of sight or dimness of vision, cannot see to read clearly, as he asserts." (*c*) *Infra*, § 685.

(*d*) *Supra*, § 636. (*e*) Till the 16th century peers used often to prefix their christian names; Tait Ev., 66. (*f*) See 14 and 15 Vict., c. 60.

(*g*) Their proper designations are in this form, "The Honourable William Henry Scott, commonly called the Earl of Dalkeith."

their estates led to their signing by these alone, like peers. This usurpation of a lordly privilege occasioned the introduction of a clause into the act 1672, c. 21, "concerning the privileges of the office of Lyon King at Arms;" by which only noblemen and bishops are allowed to sign by their titles; and all other persons are ordained to "subscribe their christian names or the initial letter thereof, with their surnames, and may, if they please, adject the designations of their lands, prefixing the word *of* to the said designations." As the object of the act was not to secure the authentication of deeds, and as its sanction is punishment of the offender, and not nullity of the writing, deeds signed in this way are held to be effectual (*h*).

§ 664. If the subscription to a deed is genuine, and can reasonably be regarded as representing the party's name, it will be sustained, although it is faulty both in spelling and penmanship (*i*).

§ 665. The object of the statutes which enjoin subscription—namely to require an authentication which it would be difficult to fabricate—is in a great measure defeated where parties sign merely with their initials. Indeed, one who can only scrawl two or three letters can hardly be called a person who "can subscribe" (*j*). The act 1672, c. 21 (*k*), also, seems to forbid subscription by the initials of both name and surname. But uniform practice, commencing when writing was not a common accomplishment, has settled the validity of deeds signed by initials (*l*); the act 1672 being considered as merely demonstrating the proper mode of subscription by commoners, as contrasted with signature by the names of their lands. There seem to be no exceptions as to the deeds which may be validly signed by initials. Bonds (*m*), discharges (*n*), leases (*o*), assignations (*p*), and contracts of service (*r*), have been sustained when so authenticated; and although it has been doubted whether heritage could be carried by a deed signed in this way (*s*), there is no principle or authority for the distinction.

(*h*) Gordon *v.* Murray, 1765, M., 16,818. (*i*) See Perryman *v.* M'Clymont, 1852, 14 D., 508; compared with Din *v.* Gillies, 18th June 1812, noted in Weirs *v.* Ralston, 22d June 1813, F. C.—M'Cally *v.* Inglis, 1821, 1 S., 69—See *supra* (*z*).

(*j*) 1579, c. 80, *supra*, § 639. (*k*) *Supra*, § 663. (*l*) Cases in following notes. (*m*) Piery *v.* Ramsay, 1628, M., 16,801—Houston *v.* Houston, 1631, M., ib.—L. Culterallers *v.* Chapman, 1667, M., 16,803. (*n*) Grierson *v.* Grierson, 1633, M., 16,802. (*o*) E. Traquair *v.* Gibson, 1724, M., 16,809.

(*p*) Coutts *v.* Straiton, 1681, M., 16,804. (*r*) Forrest *v.* Marshall, 1701, M., 16,805. (*s*) Crosbie *v.* Picken, 1749, M., 16,814—*Contra*, Ker *v.* Gibson, 1693, M., 16,805—Weirs *v.* Ralston, 22d June 1813, F. C.

§ 666. But a deed signed by initials, although not null, is not probative, like one which bears a full subscription; and it will not receive effect, unless its authenticity is proved (*t*). Accordingly, a deed subscribed in this way is not effectual as a warrant for summary diligence, and cannot be enforced without an action (*u*). In several cases proof of the party's custom to sign by initials was required (*x*). But such evidence, although highly important, especially if the instrumentary witnesses are dead, is not indispensable; for the first, as well as the last, of a number of deeds signed by the person in this way ought to receive effect (*y*). A more important circumstance is the party's recognition or adoption of the writing. Every fact, however, which bears on the issue whether the deed is genuine must be taken into view, as each case depends on the whole evidence adduced before the jury upon the point.

§ 667. A deed signed by a cross or mark is null; as a person who can only authenticate deeds in that way is one who "cannot subscribe" (*z*). This is also the rule where the marks are intended for the party's name or initials, but do not resemble them (*a*). Custom and favour to commerce have excepted from this rule documents *in re mercatoria, e.g.*, mandates (*b*), docquets to accounts (*c*), and (what are even more important) bills and promissory-notes (*d*); all which documents have frequently been sustained when authenticated merely by a cross or mark (*e*). It is usual for the mark to be attested by witnesses, especially in bills (*f*). But this, although

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(*t*) Ersk., 3, 2, 8—Tait Ev., 66—M'Ilwraith *v.* M'Mickin, 1785, M., 16,820—Carraway *v.* Ewing, 1611, M., 16,802. (*u*) Ersk., 3, 2, 8—Tait, 67; 117—Monro *v.* Monro, 1820, Hume D., 81. (*x*) Piery *v.* Ramsay, 1628, M., 16,801—L. Culterallers *v.* Chapman, 1667, M., 16,803—Stewart *v.* Stewart, 1670, 2 B. Sup., 475—Coutts *v.* Straiton, 1681, M., 16,804—Ker *v.* Gibson, 1693, M., 16,805—Forrest *v.* Marshall, 1701, M., ib.—Meek *v.* Dunlop, 1707, M., 16,806—Thomson *v.* Sheill, 1727, M., 16,810. (*y*) Houston *v.* Houston, 1631, M., 16,801—Grierson *v.* Grierson, 1633, M., 16,802—Galloway *v.* Thomson, 1683, M., 16,805—E. Traquair *v.* Gibson, 1724, M., 16,809—Alexander, 1755, 5 B. Sup., 829—M'Ilwraith *v.* M'Mickin, 1785, M., 16,820—Shepherd *v.* Innes, 1760, M., 16,818—Weirs *v.* Ralston, 22d June 1813, F. C.

(*z*) Ersk., 3, 2, 8—Duff Feud. Con., 11—Tait, 68—Graham *v.* M'Leod, 1848, 11 D., 173. (*a*) Din *v.* Gillies, 18th June 1812, noted in Weirs *v.* Ralston, 22d June 1813, F. C.—M'Cally *v.* Inglis, 1821, 1 S., 69, compared with Parryman *v.* M'Clymont, 1852, 14 D., 508. (*b*) Bryan *v.* Murdoch, 1824, 3 S., 282; affirmed 2 W. S., 568.

(*c*) Watson *v.* Hamilton, 1824, 3 Mur., 484. (*d*) Cases in notes (*f*), (*g*).

(*e*) The party's name is usually written by some person to identify the mark, thus—John + Brown. (*f*) Brown *v.* Johnstone, 1662, M., 16,802—Same parties, 1669, M., 16,803; 1 B. Sup., 579—Cockburn *v.* Gibson, 8th Dec. 1815, F. C.—M'Dougall *v.* Oliphant, 1766, Hailes, 85.

highly useful, is not indispensable (*g*). The indorsation to a deposit-receipt may be signed by a mark (*g**).[5]

§ 668. Of course a document, even *in re mercatoria*, when signed in this way, does not warrant summary diligence. It is merely a ground of action; the party who founds on it being bound to prove its authenticity (*h*).

§ 669. The act of authentication, in order to be effectual, must be completed; because until it has been, the deed is inchoate as proof of the party's purpose. Accordingly, while a deed which a person meant to sign by initials is valid (*i*), yet if, intending to write his name at length, he stopped before finishing it, the deed is null (*k*). This was held where a person on deathbed directed a will to be prepared in certain terms, and after having it read over to him, commenced to sign it, but became so weak that he could only write the three first letters of his name (*l*). So, in another case, where George Moncrieff, after subscribing "George Mon" to his will, became unable to finish his signature, upon which the law-agent who had prepared the deed (but who was not a notary) led his hand through the remaining letters, the Court reduced the deed, some of the judges calling it "an abortive embryo that never arrived at maturity or perfection" (*m*). In neither of these cases was there any reason to suppose that the party had altered his intention after commencing to subscribe; but the deeds were in the condition of those which a person fully intended to execute, but died before completing.

§ 670. The case last cited strongly illustrates another rule of authentication, namely, that, both by the statute above noticed and by common law, it is fatal to a subscription that the party's hand

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(*g*) Ker *v.* Riddell, 1803, Hume D., 50—Craigie *v.* Scobie, 1832, 10 S., 510—Brown *v.* Johnstone, *supra*—Kennedy *v.* Watson, 25th May 1816, F. C., compared with Stewart *v.* Russell, 11th July 1815, F. C. See also M'Ilrioch *v.* M'Intyre, 2d Dec. 1826, F. C.

(*g**) Forbes' Exrs. *v.* Western Bank, 1853, 16 D., 243; 807. (*h*) Cockburn *v.* Gibson, *supra*—M'Ilrioch *v.* M'Intyre, *supra*—Monro *v.* Monro, 1820, Hume D., 81—Craigie *v.* Scobie, *supra*—Stewart *v.* Russell, *supra*. (*i*) *Supra*, § 665.

(*k*) See *supra*, § 655. (*l*) Hopkins *v.* D. Athol, 1728, M., 15,940.

(*m*) Moncrieff *v.* Monypenny, 1710, M., 15,936; affirmed, Rob., 26. See a similar case, Allan *v.* Blair, 1685, 2 B. Sup., 58, where one of the grounds of reduction of a bond was that a notary had led the granter's hand through part of the subscription.

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[5] No acceptance of a bill of exchange made after 31st December 1856 is sufficient, unless it is in writing on the bill and signed by the acceptor or by some person duly authorised by him; 19 and 20 Vict., c. 60, § 11.

was led by another while adhibiting it (*n*). One who requires such assistance "cannot subscribe"; the safeguard which *comparatio literarum* affords against forgery is lost; while there is not sufficient security that the party wrote with his full free will. On the two first of these grounds, also, a subscription written over a tracing by another person with a pencil, a pin, or the like, is invalid (*o*). The signature, however, may be copied from the name written by another person (*p*).

§ 671. Where a party's name is written for him by another, the deed is of course invalid. But the common practice among rustics of authenticating bills in this way has induced the Court to sustain such documents, on proof of the party's authority to subscribe for him (*q*), or of his adoption or homologation of the bill (*r*).

The same rule would perhaps be extended to other documents *in re mercatoria.*

§ 672. As the probative value of a signed deed arises from the signature being supposed to have been adhibited to the writing when completed (*s*), it follows that if extrinsic proof or ocular inspection shows that the deed was written above the signature, it will fall, unless consent or homologation by the party be clearly proved (*t*). The exception in regard to skeleton bills has been already noticed (*u*).[6]

(*n*) Moncrieff *v.* Monypenny, *supra*—Allan *v.* Blair, *supra*—Robertson *v.* Young, 1744, Elch., "Writ," No. 18—Ballingall *v.* Robertson, 1806, Hume D., 916—Shaw *v.* Shaw, 1809, Hume D., 922—Wilson *v.* Pringle, 1814, Hume D., 923. In Falconer *v.* Arbuthnot, 1751, M., 16,817, Elch., "Writ," No. 26, this rule was applied to a will by a blind person, whose hand had been led by one who was not a notary.

(*o*) Crosbie *v.* Picken, 1750, M., 16,814, Elch., "Writ," No. 25, S. C.—Pringle *v.* Keill, 1735, M., 16,810—Buchan *v.* Gouck, 1762, 5 B. Sup. 640. (*p*) Wilson *v.* Raeburn, 1800, Hume D., 912. By the first decision in Crosbie *v.* Picken, *supra*, the deed was sustained on the footing that the signature had been copied, although it was afterwards reduced on proof that the signature had been written over a scratching with a pin. (*q*) Jackson *v.* Williamson, 1825, 4 S., 292—Gray & Co. *v.* Robertson, 1835, 13 S., 720—Lowson *v.* Matthew, 1823, 2 S., 502. See also Muir *v.* Braidwood, 1831, 10 S., 83—over-ruling Calandar *v.* Feddes, 1775, 5 B. Sup., 394.

(*r*) Mackintosh *v.* Macdonald, 1828, 7 S., 155—Miller *v.* Little, 1831, 9 S., 328—Maiklem *v.* Walker, 1833, 12 S., 53—Reg. *v.* Parish, 1837, 8 Car. and Pa., 94—Barbar *v.* Gingell, 1800, 3 Esp., 60—*Supra*, § 568. (*s*) As to filling in the testing clause above the subscription, see § 726, *et seq.* (*t*) See Mackenzie *v.* Stewart, 1848, 10 D., 611—Campbell *v.* Grant, 1843, 5 D., 755—Stuart *v.* Smith, 1680, M., 15,928.

(*u*) *Supra*, §§ 648, 651.

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[6] All deeds granted by Her Majesty, her heirs or successors, in reference to the private estates of Her Majesty, her heirs or successors, situated in Scotland, are valid, though not executed according to the forms of the law of Scotland, if under the sign-

V. *Of Subscription by Notaries for persons who cannot write.*

§ 673. It has already been seen that all persons who "can subscribe" are bound to authenticate their deeds with their own signatures (*x*), and that blind persons who can write may sign either themselves or notarially (*y*); whereas persons who cannot write what bears a reasonable resemblance to their names or initials must use the aid of notaries (*z*). This, however, does not apply to affidavits, depositions, and declarations emitted before magistrates or commissioners of Court by persons who cannot write; the signatures of these officials being sufficient, where the inability to write is set forth.

§ 674. The probative character of a notarial attestation manifestly arises from its being adhibited by persons for whose fitness for so delicate an office the law takes proper security. But it would be a dangerous source of fraud, as well as of insecurity in rights, if mere defect in the qualifications of the attestors were fatal to a deed which bore a formal notarial execution. Accordingly, the validity of such a deed is secured, if the subscribers were habit and repute notaries, although they were not properly qualified (*a*).

§ 675. Before the Reformation the functions of the notary (as of many other lay offices) used to be discharged by churchmen. But the act 1584, c. 133, restricted the clergy to their clerical duties, "the making of testaments only excepted" (*b*). Shortly after this statute, a marriage-contract signed by a clergyman as notary was sustained, on the ground (according to the report) that the sanction of the act was not nullity in the deed, but deposition of the minister from his clerical office (*c*). But the decision could not properly have stood on this ground; as the writing was informal from being signed by only one, instead of two persons acting notarially. The Court probably proceeded on the *rei inter-*

(*x*) *Supra*, §§ 661, 664. (*y*) *Supra*, § 661. (*z*) *Supra*, § 667.

(*a*) Cunningham *v.* Sempil, 1553, M., 3091—Seton *v.* Cant, 1593, M., 12,448—L. Huntly *v.* L. Forbes, 1619, M., 12,449—Spence *v.* Reid, 1610, M., 3092—Douglas *v.* Chieslie, 1615, M., 3092. (*b*) See as to authenticating wills, § 767, *et seq.*

(*c*) L. Hassington *v.* Bartilmo, 1631, M., 16,832.

manual, attested by two or more witnesses; and, if granted *mortis causa*, are valid, whether under the sign-manual, or signed by some other person in presence of the granter, and by his or her direction in presence of two or more witnesses who attest them; 25 and 26 Vict., c. 37, § 6.

ventus and homologation arising from the marriage of the contracting parties.

§ 676. A notary is not disqualified by relationship to any of the parties to the deed (*d*). But one cannot act in a deed in his own favour (*e*). Nor can the same notary subscribe for more than one of the parties to a deed (*f*).[7]

§ 677. The act 1540, c. 117, required only one notary in subscription for persons who could not write. But that was altered by the subsisting statute 1579, c. 80, which made two notaries indispensible in "all contracts, obligations, reversions, assignations, and discharges of reversions, or eiks thereto, and generally all writs importing heritable title or other bonds and obligations of great importance" (*g*).

§ 678. Where a deed bearing a regular notarial subscription is challenged on the ground that the alleged granter was able to write, and did not authorise the notaries to sign for him, the burden of proof lies on the challenger in the first instance, as the deed is probative until reduced (*h*). But if it be admitted or proved that the

(*d*) Reid *v.* Grindlay, 1839, 9 S., 81—Duff Feud. Con., 14; 117. Can a husband attest his wife's deeds? See Tait, 1848, 10 D., 1365. (*e*) Laird Gormock *v.* the Lady, 1583, M., 16,874—Russell *v.* Kirk, 1827, 6 S., 133—Leith Bank *v.* Mathers, 1836, 14 S., 332. But merely holding stock in a bank will not disqualify a notary in deeds in favour of the bank; Farries *v.* Smith, 9th June 1813, F. C. Nor does an emerging interest annul a deed which was attested by a notary competent as at its date; see Mackenzie *v.* Smith, 1830, 9 S., 52. (*f*) Craig *v.* Richardson, 1610, M., 16,829. (*g*) This act has been enforced in regard to a disposition of heritage; Kid *v.* Dickson, 1666, M., 16,835; leases of heritage, Swinton *v.* Brown, 1668, M., 3412, 8408—Wilson, 1729, M., 16,842; renunciation of a lease, L. Jerviswood *v.* L. Livingstone, 1632, M., 16,832, 7408; submissions regarding heritage, A *v.* B, 1617, M., 16,829; and other deeds relating to such subjects, although the value was within £100 Scots, A *v.* B, 1725, M., 16,842. As to rights not of great importance, see *infra*, § 748.

(*h*) Watson *v.* Hamilton, 1822, 3 Mur., 29; 481—Veitch *v.* Horsburgh, 1637, M.,

[7] A trust-disposition and settlement of heritage and moveables, executed for the granter by two notaries, was reduced *in toto*, as not validly authenticated, because one of the notaries was nominated a trustee and executor under the deed, although he did not accept the trust. There was a declaration in the deed that the trustees might employ one of their number as law-agent and might pay him, and as the trustee who signed as notary was an agent, he was not without interest in the deed; it was admitted, and appeared from the docquet, that he knew the contents of the deed. But according to the principle of the judgment, the deed would have been equally invalid though nothing but a bare trust right had been conferred on the notary, and although he had not been aware of its contents. Lord Deas was not prepared to affirm that the objection was tantamount to the want of a statutory solemnity, and doubted whether the deed might not have been sustained, if, when it was made, no other notary could be got; Ferrie *v.* Ferrie's Trustees, 1863, 1 Macph., 291.

granter could write, and if the notary's docquet bears generally that he could not, the party founding on the deed would probably require to prove that, at the time of executing it, the granter was unable to write in consequence of sickness, accident, or the like, or that he made a statement to that effect to the notaries, and authorised them to subscribe for him (*i*). In a competition of creditors, where an assignation bearing to be granted by a person who was usually able to write, was signed notarially, the docquet stating that he was unable to write on account of sickness, and where the deed was challenged as false, the Court declined to determine the general point whether the ground of reduction was relevant, but, before answer, they ordained the assignee to adduce what probation he could to prove the alleged inability (*k*). It is thought that such a docquet is probative of the cause of inability which it sets forth.

§ 679. If the granter of a deed, being able to subscribe, authorised notaries to sign for him, it is plain that neither he nor those in his right can impugn the subscription (*l*). It is doubtful if even creditors or a competing singular successor can do so (*m*). The notaries' knowledge of the fact would not affect the deed, but would subject them to punishment for malversation (*n*).

§ 680. To prevent notaries from subscribing deeds without sufficient evidence of the granter's authority, the Court of Session by an Act of Sederunt did "prohibit and discharge notaries to subscribe writs for persons who cannot write themselves, unless it either consist in the notaries knowledge that he for whom or at whose command they subscribe is the person designed in the writ or that the same be attested by those who subscribe witnesses to the notary's subscription, or by other credible persons, and which the notary is to mention when he subscribes for the party" (*o*).

§ 681. Originally the notary interposed by guiding the hand of the granter of the deed, while the latter signed his own name (*p*). But now the party signifies his authority by touching the pen of

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16,834; 1 B. Sup., 365, S. C.—Ogilvie *v.* Din's Heirs, 1612, M., 16,829—Campbell *v.* Bell, 1610, M., 16,828—Littlejohn *v.* Hepburn, 1608, M., ib. (*i*) See cases in preceding note. (*k*) Clark *v.* Blairgounie, 1683, M., 16,837. See also Littlejohn *v.* Hepburn, *supra.* (*l*) Veitch *v.* Horsburgh, 1637, M., 16,834—Ogilvie *v.* Din's Heirs, 1612, M., 16,829—Littlejohn *v.* Hepburn, 1608, M., 16,828—Duff Feud. Con., 14. See Campbell *v.* Bell, 1610, M., 16,828—Watson *v.* Hamilton, 1822, 3 Mur., 29. (*m*) See Clark *v.* Balgounie, 1683, M., 16,837—Craig *v.* Collison, 1610, M., 16,828—Reid *v.* Reid's Tr., 1835, 13 S., 1063; S. C., 1837, 16 S., 278—Duff, *supra.* (*n*) Tait Ev., 81. (*o*) Act of Sederunt, 21st July 1688.

(*p*) 1555, c. 29—Stair, 4, 42, 9—L. Gormock *v.* the Lady, 1583, M., 16,874.

the notaries, who thereupon adhibit their respective subscriptions. This is the mode of attestation pointed out by the act 1681, c. 5; which ordains that "no witness shall subscribe as witness to any party's subscription unless he then know that party, and saw him subscribe, or saw or heard him give warrand to a notar or notars to subscribe for him, and, in evidence thereof, touch the notar's pen, or that the party did, at the time of the witnesses subscribing, acknowledge his subscription." It would appear that under this clause the want of touching the pen is not fatal, where the witnesses heard the party acknowledge his subscription by notaries.

§ 682. The two notaries must sign *unico contextu;* because their subscription represents that of the party, which is indivisable; and because the act 1579, c. 80, was designed to prevent fraud, by requiring two notaries and four witnesses to be engaged together in the authentication (*r*). They sign each page or leaf, adding the letters N. P. to their signatures, and on the last page appending also their mottoes. The deed ends with a testing clause stating the party's subscription in the usual terms, but mentioning four instead of two witnesses (*s*). Appended to it is the notaries' docquet (*t*).

§ 683. This instrument must state that the notaries had authority to sign both the body of the deed (*u*), and marginal additions when there are any (*x*). If the statement of authority is omitted, it would seem that witnesses cannot be received to prove it was given (*y*). Touching the pen in token of authority ought also to be stated; but it will be presumed, until disproved; and the deed is valid although that fact is not set forth (*z*). It is proper, but not indispensible, to state the cause of the granter's inability to write (*a*).

(*r*) Ersk., 3, 2, 9—Duff Feud. Con., 13—Tait, 78—White *v.* Knox, 1711, M., 16,841—Rollands *v.* Rolland, 1767, M., 16,851—M'Morran *v.* Black, 1624, M., 16,830—Cow *v.* Craig, 1633, M., 16,833; 1 B. Sup., 343, S. C.—A B, 1666, 2 B. Sup., 426.

(*s*) Duff Feud. Con., 13. (*t*) There is no universal form for the docquet. It is usually written by one of the notaries, and signed by him and by the other, who prefixes to his subscription the words "*ita est,*" and adds to it "notary-public and co-notary in the premises." (*u*) Birrel *v.* Moffat, 1745, M., 16,846, Elch., "Writ," 19, S. C.—Philip *v.* Cheap, 1667, M., 16,835, 17,019; 1 B. Sup., 544, S. C.—Mackenzie *v.* Burnet, 1688, M., 16,838—Williamson *v.* Urquhart, 1688, M., 16,838. In Birrel *v.* Moffat, it was held that the statement of authority cannot be made in the deed, because that cannot be looked at until the authority to sign it is proved. But this may be doubted. (*x*) Elliots *v.* Riddle, 1695, M., 16,838. There is room for doubt whether the want of this is a nullity; as the general statement of authority to sign includes all the requisite subscriptions, whether at the bottom or margin of each page.

(*y*) Philip *v.* Cheap, *supra.* (*z*) Duff Feud. Con., 13—Tait, 79—Dallas *v.* Paul, 1704, M., 16,839—Maver *v.* Russel, 1710, M., 16,841. (*a*) Tait, 80—Duff, 14.

Where a notary's docquet contains his name in his own handwriting, it is valid, although it is not subscribed by him (*b*).

VI. *Of Reading the Deed to the Party before Subscription.*

§ 684. Every deed ought before subscription to be read over by the party, or to him if he cannot read. The manifest propriety of this proceeding led the Court in several cases to reduce deeds by blind persons or persons unable to read, where the omission to read them to the granters before subscription was combined with other suspicious circumstances (*d*). It was even held to be an essential solemnity in all such deeds that they should be read over to the party before subscription (*e*). And in one case a will signed by a party was reduced (although there was no proof of fraud) on the ground that the instructions for preparing it had been given in May, and that when it was signed in August it was not read over or its substance recapitulated to the granter who was then on his deathbed (*f*). It was doubtful on the older cases whether a deed by one unable to read required to be read to him in presence of the instrumentary witnesses (*g*).

§ 685. These decisions (which were all pronounced before the introduction of jury trials in civil causes) did not properly discriminate between what are by law solemnities essential to the execution of deeds, and what is merely a circumstance—although an important one—in the question of fact, whether a deed formally executed was truly consented to by the apparent granter. That distinction was first brought out in the leading case of the Earl of Fife *v.* Sir James Duff, in which the House of Lords, reversing the decision of

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(*b*) Cullen *v.* Thomson, 1731, M., 16,842—Gordon *v.* Murray, 1765, M., 16,818.

(*d*) Falconer *v.* Arbuthnot, 1751, Elch., "Writ," No. 26—Ross *v.* Aglianby (Lothian's case), M., 16,858; affd., 11th June 1794, 10 F. C., Appx., 8, as explained by Lords Ch. Eldon and Redesdale in E. Fife's case, 1823, 1 Sh. App. Ca., 547, 567—Bayne *v.* Belshes, 1793, Hume D., 908—Paterson *v.* Smith, 1809, Hume D., 921.

(*e*) In Barbour *v.* Caddell, 1790, Hume D., 906, it was so held as to a deed signed by a mark. See also Petrie *v.* Lithgow, 1742, M., 15,941, S. C., Elch., "Testament," No. 3—Young's Children *v.* Anderson, 1688, M., 15,929. But when a deed was signed notarially, it was held not essential to mention in the notary's docquet that it had been read over to the party; Yorkstoun *v.* Grieve, 1794, M., 16,856—Stoddart *v.* Arkley, 1799, M., 16,857—Dewar *v.* M'Gregor, 1801, Hume D., 913. *Contra*, Ross *v.* Aglianby, 1792, M., 16,858. (*f*) Arbuthnot *v.* Burnet, 1694, M., 15,929; and see Robertson *v.* Ker, 1742, M., 15,942; Elch., "Testament," No. 6, S. C. (*g*) Compare Dewar *v.* M'Gregor, *supra* (*e*), Falconer *v.* Arbuthnot, *supra* (*d*), and Ross *v.* Aglianby, *supra* (*e*).

the Court of Session, held that it is not an essential solemnity to a deed signed by a blind person that it be read over to him before subscription. Accordingly, a deed executed by such a person with his own subscription, and properly attested, is probative and effectual until reduced. In the action of reduction the granter's knowledge of its contents is presumed, but may be disproved; and the fact of not reading it over is admissible and important, but not conclusive, evidence of the want of such knowledge (*h*).

(*h*) Duff *v.* the Earl of Fife, 1823, 1 Sh. Ap. Ca., 498; reversing 30th November 1819, F. C. This was an action of reduction of a trust-deed and deed of entail, both executed on 7th October 1808, and of a deed altering them in some respects, which was executed on 12th November of the same year. They were all subscribed by the Earl of Fife with his own hand when he was blind; and each bore the attestations of two witnesses named and designed in common form. The Court of Session had reduced the two first deeds, on the ground of the omission to read them over before subscription, and also the deed of alteration, but without stating distinctly the ground of that part of their decision. The House of Lords' judgment of reversal contains the following findings (1 Sh. Ap., 509): "Find that, under the circumstances of this case, notwithstanding the defect in sight of the Earl of Fife, proved upon the issues formerly tried in this cause, the signature of the instruments in question by notaries was not required by the statute of 1579, and that the signature of the Earl of Fife was the proper signature to give effect to those instruments, according to the true intent and meaning of the statute; that the signature of the Earl of Fife appearing on the face of the said instruments, and the instruments being apparently attested by two witnesses, the instruments apparently so signed and attested are in law probative deeds; and that to impeach such instruments as probative deeds of the Earl of Fife the pursuer was bound to prove that the witnesses, or one of them, did not see the Earl of Fife subscribe the said instruments respectively, or hear him acknowledge his subscription thereto; that to impeach the said instruments respectively, though in law probative instruments, as the deeds of the Earl of Fife, on the ground that the Earl of Fife did not know the contents of such instruments respectively when he subscribed the same respectively, and that therefore the same were not respectively the deeds of the Earl of Fife, the pursuer was bound to prove that the Earl did not know the contents of such instruments respectively when he subscribed the same respectively; that it is not a solemnity required by law that the said instruments respectively should have been read over to the Earl of Fife at the times of the execution thereof respectively, or at any other time or times; and that if such instruments respectively were duly executed and attested by the Earl, and in law probative instruments, the knowledge of the Earl of the contents thereof respectively must be presumed until the contrary should be shown; but that proof that the said instruments respectively were not read over to the Earl of Fife at the time of execution thereof, is evidence to be received that he did not know the contents of such instruments respectively, but that such evidence is not conclusive evidence that he did not know the contents of such instruments respectively, inasmuch as his knowledge of the contents of such instruments may be proved by other evidence from which such knowledge may be inferred; that execution by the Earl of Fife of the instrument purporting to be a deed of alteration of the deed of trust-disposition sought to be reduced, supposing such deed of alteration was executed and attested according to the statute, and that the Earl knew the contents thereof, is evidence to be received to prove that the Earl of

§ 686. Not long after that judgment the Court of Session found that the allegations against a deed were not relevant to infer impetration; one of them being that it had not been read over or explained to the granter, who was blind when he signed it (*i*).

The rule thus settled with regard to deeds signed by blind persons with their own hands, applies equally to deeds subscribed notarially for persons unable to write.

VII. *When Instrumentary Witnesses are required.*

§ 687. When a deed is subscribed with the party's own hand, the attendance of witnesses is required expressly by the acts 1540, c. 117, and 1681, c. 5, and indirectly by the act 1593, c. 179. The act 1579, c. 80, fixes their attendance at notarial subscription of deeds importing heritable title, and deeds of great importance.

§ 688. Mr Erskine (*k*), following Sir George Mackenzie (*l*), and founding on two decisions of old date, holds that deeds subscribed by members of a corporation, or even by a number of private persons, are effectual without witnesses; the parties being presumed to have been witnesses to each other's subscriptions. But one of these cases (*m*) occurred before the act 1681, and related to a writing *in re mercatoria;* and the other (*n*) is not a precedent on the general point, as the obligation undertaken by each subscriber was less than £100 Scots, and the precise ground of decision is not reported (*o*). Of the other cases which favour Mr Erskine's view two (*p*) occurred before the act 1681, and in decrees arbitral, which were not strictly dealt with at that time; and in the remaining case of the same tendency (*r*), the writing (a bond of astriction) had been homologated by both parties for seve-

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Fife did know the contents of such trust-disposition and deed of entail respectively at the time when such trust-disposition and deed of entail appear on the face thereof to have been signed by the said Earl."

With these and some additional findings, the case was remitted to the Court of Session for new trial on an issue—Whether the deeds in question were not the deeds of the Earl of Fife? The result of the second trial was to cut down the two principal deeds, on the ground that one of the instrumentary witnesses had not seen the granter subscribe, or heard him acknowledge his subscription; E. Fife, 3 Mur., 497; 4 S., 385; 2 W. S., 166. (*i*) Ker *v.* Hotchkis, 1837, 15 S., 983. (*k*) Ersk., 3, 2, 23.

(*l*) Mack. Obs. on 6 Parl. James VI (1579), c. 80, obs. 3. (*m*) Forrest *v.* Veitch, 1676, M., 16,970. (*n*) Sea-box of Queensferry *v.* Stewart, 1732, M., 16,899. (*o*) Bell on Testing Deeds, Lec. 3, p. 94. (*p*) Moncur *v.* Waddell, 1615, M., 16,876—Hunter *v.* Halyburton, 1632, M., 16,880; 11,620, S. C.

(*r*) Rutherford *v.* Feuars of Bowden, 1748, M., 8443.

ral years.—On the other hand, deeds signed by three (*s*) and four (*t*) co-obligants have been held ineffectual from wanting instrumentary witnesses; and a deed signed by the Marquis of Douglas, his curators and a third party, fell in consequence of the same defect, the Court treating the opposite view as "untenable in any case" (*u*). It is inconsistent with the terms of the statutes; and is objectionable on the ground that one party to a deed cannot attest another's subscription. Accordingly, there is good ground for holding, with the majority of text writers (*x*), that instrumentary witnesses are required, however numerous the parties to the deed may be.

VIII. *Who may be Instrumentary Witnesses.*

§ 689. It is manifest that one who is either blind (*y*) or insane when a deed is executed, cannot be an instrumentary witness to it. Pupils also seem not to be competent for that office (*z*). According to some eminent authorities women are disqualified (*a*). But this is more than doubtful. Originally, if any were present at the subscription, their names were included in the list of witnesses appended to the deed (*b*); and although their exclusion in practice naturally followed upon the statutes which required the witnesses to subscribe, and which were passed when not many men, and but few women, could write; there seems to be no good ground for excluding them in modern times, when they are perfectly fit for the office (*c*). Accordingly, in the only modern case in which the

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(*s*) Miller *v.* Farquharson, 1835, 13 S., 838. The opinion of the Lord Ordinary in this case (the very learned Lord Corehouse) is against Mr Erskine's view.

(*t*) Rankine *v.* Williamson, 1633, M., 16,881—See Welsh *v.* Milligan, 1794, Bell's Fo. Ca., 44. (*u*) Douglas *v.* Littlegill's Crs., 1742, M., 17,033; 5 B. Sup., 744; Elch., "Writ," No. 11, S. C. (*x*) Bankt., 1, 11, 33—Bell on Testing Deeds, Lec. 3, page 88, *et seq.*—More, 398—Tait Ev., 83—Duff Feud. Con., 28—*Contra*, 1 Ross Lec., 151—The point was raised in Smith *v.* Bank of Scotland, 25th January 1821, F. C. (*y*) A deed was reduced on the verdict of a jury finding that one of the witnesses was almost quite blind; Cunningham *v.* Spence, 1824, 3 Mur., 402; 3 S., 205, S. C. (*z*) Ersk., 4, 2, 27—1 Ross Lec., 148—Tait Ev., 84—Duff Feud. Con., 15—Davidson *v.* Charteris, 1738, M., 16,899; Elch., "Witness," No. 2—But see *contra* D. Queensberry *v.* Barker, 7th July 1810, F. C.—Home *v.* Home, 1582, M., 8906—See also Fountainhall, 3 B. Sup., 344. (*a*) Ersk., 4, 2, 27—Bankt., 1, 11, 27—ib., 4, 30, 20—1 Ross Lec., 148. In the opinions of John Clerk (Lord Eldin), Adam Gillies (Lord Gillies), and David Cathcart (Lord Alloway), in the Dalrymple cause, it is stated that a woman cannot be an instrumentary witness; see 2 Hag. Con. Rep., Appx., 110, 124, 142.

(*b*) 1 Ross Lec., 125—More, 399. (*c*) The point is stated as doubtful by Mackenzie, Obs. on 6 Parl. James VI (1579), c. 80—and Burnett on Cr., 390, note. Professor More thinks women are admissible; Notes to Stair, 399.

point arose, an issue was tried, Whether the subscription of a female as witness was genuine?—thereby inferring that she was competent (*d*).

As the witnesses must subscribe the deed, a person who cannot write, or who can only write his initials, is incompetent (*e*).

§ 690. The old objection of interest was much limited in regard to instrumentary witnesses, on the ground that the law should not hold as disqualified those who were chosen by the parties to attest their deeds (*f*). Thus legatees in small sums (*g*), and even a "considerable legatee" (*h*), were held competent; and deeds of nomination to a gratuitous office, *e.g.*, trustee or executor, have been repeatedly sustained, where the person so named was one of the witnesses to the granter's subscription (*i*). A will was even held effectual, where one of the witnesses was both a legatee in a small sum and an executor (*k*). But where the creditor in a bond was one of the witnesses to the debtor's subscription, the deed was very justly held null (*l*). The late statutes (*m*), which abolished the objection of interest as a ground for excluding witnesses in Courts of law, and admitted the parties as witnesses in most civil causes, do not (it is thought) remove this objection to instrumentary witnesses; and considering how many and dangerous frauds would be perpetrated, if a party could legally witness all deeds in his own favour, there is good ground for retaining the disqualification. In practice it need hardly be observed, one who has any interest under a deed should never be chosen to attest it.

§ 691. The objections of relationship (*n*), agency (*o*), and infamy (*p*), were held not to apply to instrumentary witnesses at a time when these were peremptory grounds of exclusion in other matters. But the admissibility of an instrumentary witness so

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(*d*) Setton *v.* Setton's Tr., 1816, 1 Mur., 10. The subscription was found not to be genuine. (*e*) Setton *v.* Setton's Tr., *supra*—Meek *v.* Dunlop, 1707, M., 16,806—Stewart *v.* Stewart, 1779, M., 16,906. (*f*) 1 Ross Lec., 148—Duff Feud. Con., 15. (*g*) Ingram *v.* Steinson, 1801, M., "Writ," Appx., No. 2.

(*h*) Grahame *v.* M. Montrose, 1685, M., 16,887. (*i*) Mitchell *v.* Miller, 1742, M., 16,900—Tennent *v.* Tennent's Tr., 1742, Elch., "Writ," No. 12—Scott *v.* Caverhill, 1786, M., 16,779—Ingram *v.* Steinson, 1801, M., "Writ," Appx., No. 2—*Contra*, Laird of Innerleith *v.* Bishop of Glasgow, 1613, M., 16,876—and Ersk., 4, 2, 27.

(*k*) Ingram *v.* Steinson, *supra*. (*l*) Robertson *v.* Abercrombie, 1627, M., 16,879—1 Ross Lec., 148. (*m*) 15 and 16 Vict., c. 27, § 1—16 Vict., c. 20, §§ 2, 3.

(*n*) Ersk., 4, 2, 27—Hamilton's Crs. *v.* Hamilton, 1713, M., 16,734—Falconer *v.* Arbuthnot, 1750, M., 16,759—Thomson *v.* Borthwick, 1742, Elch., "Witness," No. 16.

(*o*) Ersk., *supra*—Scott *v.* Caverhill, 1786, M., 16,779—E. March *v.* Sawyer, 1749, M., 16,757. (*p*) Ersk., *supra*—Baillie *v.* Lockhart, 1710, M., 8433; 16,891, S. C.

tainted was limited to facts immediately connected with the *res gestae* of executing the deed. And accordingly, he was not allowed to be examined as to whether the granter of a bond, being in minority, had represented himself to be major (*r*), or whether the granter of a deed affecting heritage was *in liege poustie* at its date (*s*).

IX. *How many Witnesses are required.*

§ 692. In all deeds signed by the party himself and requiring to be attested, two witnesses are required, being the smallest number which could come under the term "witnesses" in the acts of 1540, and 1681. The act 1579, c. 80, requires four witnesses to the notarial subscription of deeds importing heritable title and deeds "of great importance" (*t*). The number required in other deeds and testaments signed notarially is considered afterwards.

The same witnesses may attest the subscriptions of any number of parties, whether signing themselves or using notaries (*u*).[8]

X. *Of the Witnesses' knowledge that the Subscription is genuine.*

§ 693. The acts 1681, c. 5, prohibits persons from subscribing as witnesses unless they "then know the party;" and it declares that persons contravening the provision shall be punished as accessory to forgery. But this irregularity—like that of the witness not seeing the party subscribe, or hearing him acknowledge his subscription, for which the same sanction is provided (*x*)—is also fatal to the deed (*y*). The act has been liberally interpreted as to the extent of the witnesses' acquaintance with the party. He may safely and validly attest, provided he has credible information from those present, or even from the person subscribing, that that person is the granter of the deed (*z*). In such cases, however, the meagre

(*r*) Thomson *v.* Borthwick, *supra.* (*s*) Ersk., *supra*—Hamilton *v.* Hamilton, *supra*—But see Falconer *v.* Arbuthnot, *supra.* (*t*) This was enforced in Sclanders *v.* Hill, 1710, M., 6844—Abercrombie, 1618, M., 16,829. (*u*) Hardie *v.* Hardie, 6th December 1810, F. C. (*x*) See *infra* (*a*). (*y*) Campbell *v.* Robertson, 1698, M., 16,887. See Young *v.* Glen, 1770, M., 16,905; Hailes, 364, S. C.

(*z*) In Walker *v.* Adamson, 1716, M., 16,896, a deed was sustained where the witnesses were merely informed by the neighbours and the person subscribing that she was the granter; but in Campbell *v.* Robertson, *supra*, where a boy of fourteen was called

[8] The signature of a subscriber of the memorandum or articles of association of a company, under the Companies Act 1862, is sufficiently attested by one witness; 25 and 26 Vict., c. 89, §§ 11, 16.

knowledge which the witness had as to the granter's identity would be an important fact, if the deed were alleged to be forged.

§ 694. The act 1681, c. 5, also enjoins that "no witness shall subscribe as witness to any party's subscription, unless he" "saw him subscribe," "or that the party did at the time of the witness' subscribing acknowledge his subscription." If the witness signed without having one or other of these proofs of authenticity, the deed is null, although there is no doubt as to its genuineness (*a*). In one of the trials of the Earl of Fife's case the point occurred, whether a blind person's acknowledgment of his subscription to a witness who did not see it adhibited is sufficient. The Lord Chief Commissioner charged the jury thus:—"It is agreed that Wilson the witness did not see the deed subscribed; and therefore the point to be proved is, whether the Earl acknowledged his signature. Here the first question is, Was it vocally acknowledged? It is admitted that the subscribing was not seen, and it is proved that there was no vocal acknowledgment. This is a second step the pursuer has made, which reduces the case to one of acknowledgment by facts and circumstances. The question is, Whether the pursuer had brought such evidence as satisfies you of the non-acknowledgment?" (*b*). His Lordship, therefore, held that the blind Earl's subscription would have been validly attested, had the witness merely heard him acknowledge it. In such cases there would be no difficulty, if the deed had not been out of the granter's hands between his subscription and acknowledgment. But even if it had, the granter might have identified it to the witness' satisfaction, as where it consisted of a certain number of pages of paper or vellum with certain marks. But a bare acknowledgment *ex intervallo* by

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off the street to be a witness, and did not know the party, the deed was reduced, although the Court believed the subscription to be genuine. In reporting this case, Fountainhall observes that the knowledge required "cannot be understood of a distinct particular antecedent knowledge, but only that he called himself so to the witnesses, else many bonds and other writs may be questioned on this head."

(*a*) E. Fife *v.* E. Fife's Trs., 1825, 3 Mur., 497; 4 S., 335; affirmed, 2 W. S., 166—Forbes *v.* Reid, 1698, 4 B. Sup., 404—Young *v.* Ritchie, 1761, M., 17,047—Stevenson *v.* Stevenson, 1682, M., 16,886—Blair *v.* Peddie, 1684, M., 13,942. In applying this rule the Court discriminate between a distinct statement by the instrumentary witness *de recenti* that he did not see the subscription adhibited or hear it acknowledged, and a mere *non memini*, especially if some interval elapsed since the attestation; see Smith *v.* Bank of Scotland, 25th Jan. 1821, as noticed *per curiam* in E. Fife's case, 22d Dec. 1825, F. C.—Young *v.* Glen, 1770, M., 16,905; Hailes, 364, S. C. See on this the sections on the improbations of deeds, *infra*, § 907, *et seq.* (*b*) E. Fife *v.* E. Fife's Trustees, 1825, 3 Murray, 498. The verdict was against the deed.

a blind person, without some such identification, would be insufficient.

§ 695. When the deed is not signed in presence of the attesting witnesses, the granter should acknowledge his subscription to them in express words. But a virtual acknowledgment, or one exhibited by conduct, not by words, is sufficient, provided it be clear and unequivocal (*c*).

§ 696. In deeds signed by notaries the witnesses attest the party's notarial execution, and not merely the notaries' signatures. The act 1681, c. 5, accordingly enjoins witnesses not to subscribe, unless they "saw or heard the party give warning to a notar or notars to subscribe for him, and in evidence thereof touch the notar's pen." This enactment (like those already noticed) is enforced with nullity of the deed (*d*).

§ 697. The attestation is valid, although the body of the deed was purposely concealed from the witness; for he has only to attend to the genuineness of the subscription, not to the terms of the writing authenticated (*e*).

XI. *Of Subscription by the Instrumentary Witnesses.*

§ 698. As already mentioned, the act 1540, c. 117, ordained that "na faith be given" to writs which did not bear the subscriptions of the granter and witnesses. But the latter requisite was not observed in practice (*f*). It was made imperative by the act of 1681, c. 5 (*g*), and has since that time been considered as indispensible to subscription either by the parties themselves or notarially (*h*). The witnesses require to sign only the last page, however long the deed may be (*i*).

(*c*) Per Lord Chief-Commissioner in Earl of Fife's case, *supra*, and per L.-Ch. Eldon in same case on appeal, 2 W. S., 201—Bell on Testing Deeds, 272.

(*d*) Storach *v.* Cheyne, 1678, M., 12,668. In Farmers *v.* Myles, 1760, M., 16,849, the deed fell, because three of the witnesses did not hear the authority given or see the notaries' pens touched. In Johnston *v.* Johnston, 1698, 4 B. Sup., 418, a deed was reduced, because two of the witnesses signed in presence of the granter, but without hearing warrant given to the notaries, and another denied his subscription. See also Anderson *v.* Cock, 1709, M., 16,840, where the nullity was that one of the witnesses added to his signature, "witness to the co-notary's subscription." So deeds signed at different places with two different witnesses to each notary's signature, instead of four witnesses seeing the whole notarial subscription, have been reduced, although the party admitted his authority to sign; Rolland *v.* Rolland, 1767, M., 16,851—Whyte *v.* Knox, 1711, M., 16,841—M'Morran *v.* Black, 1624, M., 16,830—*Supra*, § 682.

(*e*) Ormiston *v.* Hamilton, 1708, M., 16,890.

(*f*) Ersk., 3, 2, 7.

(*g*) *Supra*, § 642.

(*h*) Ersk., 3, 2, 13—Tait, 82—Duff Feud. Con., 16.

(*i*) 1696, c. 15.

It is [illegible] that each witness should sign with his own hand, and [illegible] the intervention of another person whose pen he has [illegible] and a subscription by initials is ineffectual (k). Each ought to add the word "witness" to his signature: but that is not essential to the attestation (m).

§ 699. Where one of the witnesses to a notarial subscription added to his signature "witness to the notary's subscription," the attestation was held to be limited, and the deed fell, although the deed set forth that it was signed by two notaries before four witnesses (n).

§ 700. Witnesses who attest the subscriptions of several parties signing *unico contextu*, require to sign only once: but their subscriptions should be repeated (although that is not indispensible), when any of the parties sign separately (o).

§ 701. The witnesses to subscription by the same party may sign at different times, *e.g.*, when one sees the subscription adhibited and the other hears it acknowledged (*p*); and it is not indispensible that witnesses to a notarial subscription should sign at the same time (*r*). In all cases, however, the deed must be complete before it is produced in judgment (*s*). And if it appears that any of the subscriptions were adhibited *ex intervallo*, the jury will have to determine on the evidence, whether the deed so attested is the same as the deed executed (*t*).

§ 702. A deed signed by the witnesses in anticipation of a subscription which, although genuine, was not adhibited or acknowledged in their presence, is null (*u*).[9]

XII. *Of the Testing Clause.*

§ 703. Every formal deed must conclude with a testing clause, in which are set forth the facts relating to its execution and authentication. This clause mentions—(A) the number of pages of

(*k*) Setton *v.* Setton's Tr., 1816, 1 Mur., 9—Stewart *v.* Stewart, 1779, M., 16,906.

(*l*) Meek *v.* Dunlop, 1707, M., 16,806. (*m*) Morrison *v.* L. Salton, 1694, 4 B. Sup., 163—L. Blantyre, 1850, 13 D., 40. (*n*) Anderson *v.* Cock, 1749, M., 16,840. (*o*) See Edmonstone *v.* Edmonstone, 1749, M., 16,901.

(*p*) Robertson *v.* M'Caig, 1823, 2 S., 544. (*r*) See Straiton *v.* Robertson, 1710, M., 8344. (*s*) Straiton *v.* Robertson, *supra*. (*t*) Compare Frank *v.* Frank, 1795, M., 16,824, affd. 1809, 15 F. C., Appx., 753, with Hume *v.* Dickson, 1730, M., 16,898. (*u*) Young *v.* Ritchie, 1761, M., 17,047.

[9] Maclean or Morrison *v.* Maclean, 1863, 1 Macph., 304.

which the deed consists, when it extends over more than one—(B) the name and designation of the writer—(C) the fact that the deed was subscribed by the granter—(D) the date and place of subscription—(E) the names and designations of the witnesses—(F) the marginal additions, interlineations, or erasures, if there be any such.

§ 704. A—*Mentioning the number of pages.*—The act 1696, c. 15, directs that, in deeds written bookways, "the end of the last page make mention how many pages are therein contained." This, however, is not indispensible in deeds written on one sheet (*x*); and in other cases it is enough to mention merely the number of sheets of which the deed consists (*y*). Even errors in the enumeration of the pages have been overlooked, where it served to indicate the proper number; as in the cases of a deed written on ten pages, bearing to be "on this and the ten preceding pages" (*z*), and of an instrument of sasine in the old form written on nine, and bearing to be on eight pages (*a*). A deed was sustained where the testing clause stated that it was written "on this and the twelve preceding pages," and the word "pages" was on erasure (*b*); and where a deed consisting of seven pages bore to be "written on this and the *six* preceding pages," but *x* was on erasure, the deed was sustained (*c*); as was also a deed which was stated to be "written on this and the *twelve* preceding pages," the letters *ve* being on erasure (*d*). In these cases the letters which were not written over erasures would not have corresponded to any other numbers than those of which the deeds respectively consisted. In another case a deed on several sheets was sustained without the pages being numbered at all, the catchwords identifying the several pages as consecutive. But the Court were in a great measure moved by its being a marriage-contract, on which marriage had ensued (*e*).

(*x*) Macdonald *v.* Macdonald, 1778, M., 16,956—Hailes, 789, S. C.—Robertson *v.* Ker, 1742, M., 16,955, Elch., "Writ," No. 10, S. C.—See *supra*, § 659. An instrument of sasine on one page, bearing to be on this and the two preceding pages, was sustained; Morrison *v.* Ramsay, 1826, 5 S., 150. (*y*) Henderson *v.* Wilson, 1797, M., 17,059; 15,444; M., App. "Tailzie," No. 8, S. C. (*z*) Smith *v.* North B. Insur. Co., 1850, 12 D., 1182. (*a*) Dickson *v.* Cunningham, 1829, 7 S., 503; affirmed 5 W. S., 657—See also M'Ghie *v.* Leishman, 1827, 5 S. D., 758. Mentioning the pages in instruments of sasine is required by 1686, c. 17. (*b*) Morrison *v.* Nisbet, 1829, 7 S., 810. (*c*) E. Cassilis *v.* Kennedy, 1831, 9 S., 663. Sasine and confirmation had passed on the deed forty years before the question as to its validity was raised. (*d*) Gaywood *v.* M'Keand, 1828, 6 S., 991. (*e*) Porteous *v.* Bell, 1757, 5 B. Sup., 855. This case was not properly decided on the principle of *rei interventus*, by which there could be no doubt that the deed had been validated. See the chapter on *rei interventus*, below, § 815, *et seq.*

§ 705. These decisions leave the question still open, Whether a deed is null where the number of pages is omitted, or where the statement of them is so inaccurate as to be equivalent to an omission? On the one hand, the act 1696 does not declare that deeds in which the pages are not enumerated shall be held null. But on the other hand, it only allows parties to write their deeds bookways, provided the number of pages be mentioned; and it is only deeds marked and signed in the prescribed mode, which the act declares to be valid as those in the old form. Compliance with the requirements of that act seems therefore to be an essential condition to the validity of deeds written by way of book.[10]

§ 706. It is proper, but not essential, that the number of sheets be mentioned in deeds written in the old form of a roll, with the several portions pasted together (*f*).

§ 707. B—*Naming and designing the writer.*—The act 1593, c. 179, required all deeds to make special mention in "the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocesie, and other denomination of the writer of the body of the foresaid original writs and evidents; otherwise the same to make na faith in judgment nor outwith in time coming." Although this enactment was sufficiently clear and stringent, the Court disregarded it; and where the writer was neither named nor designed, allowed the defect to be supplied by a condescendence and proof (*g*). This led to the pro-

(*f*) See Sclater *v.* Clyne, 1831, 9 S., 248. (*g*) See cases in M., 16,859: 16,860; 17,015; 17,019; 17,020—4 B. Sup., 168—Br. Synop., 2708.

[10] It is thought that a deed cannot receive effect as probative by the law of Scotland, if the number of pages be not mentioned in the testing clause. Where a deed was written on five separate sheets of parchment, and on one side only of each sheet, and where the testing clause bore that it was "written on this and the four preceding skins of duly stamped parchment," and did not state the number of pages on which it was written, and where each page was not numbered, Lord Cowan (Ordinary) held that, in both particulars, there was a non-compliance with the requirements of the statute, fatal to the validity of the deed as a probative Scotch deed; and the First Division found that the deed was not "authenticated according to the requirements of the statutes," and was not "probative according to the law of Scotland;" Earl of Hopetoun *v.* Scots Mines Co., 2d June 1854, reported 1856, 18 D., 739, 747. See also Thomson *v.* MacCrummen's Trustees, 1856, 18 D., 470; affirmed and reported under name of Galbraith and Others (MacCrummen's Trustees) *v.* the Edinburgh and Glasgow Bank, 1859, 31 Scot. Jur., 425. The act 19 and 20 Vict., c. 87, abrogating pagination as a solemnity, does not affect the provision of the act 1696, c. 15, or of any other act or acts of Parliament "as to mentioning in the testing clause the number of pages of which the deed consists." See *infra*, § 735, note.

vision in the act 1681, c. 5, which enacted and declared that "all writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses." Since the passing of this act the omission to name and design the writer of a deed has repeatedly been held a nullity, which could not be removed by proof (*h*).[11]

§ 708. As the act of 1681 is declaratory as well as enactive, it may be said to have restored to full force the previous act of 1593, which, although it had been disregarded by the Court, was still unrepealed (*i*). But the full and precise designation required by the older statute has not been exacted. It is enough if the general terms of the act of 1681 be observed, by the writer's name and designation being set forth in such a manner as to identify him; and the Court will determine in each case whether the designation is sufficient for that purpose (*k*). Thus deeds have been sustained in which the writer was designed as "notary" (*l*), and "writer" (*m*), (*i.e.*, attorney), without the place being specified where he carried on his business. And a deed in the Scotch form, written and executed in Dublin, the writer of which was designed as "A B, gentleman," was at first held null, but was afterwards sustained on the ground that it must be presumed he resided in Dublin, in which place "gentleman" was used to designate persons above the rank of traders or manufacturers (*n*). So a testing clause in the terms "I have subscribed these presents, written by A B at Auchterhouse," was held to be effectual (*o*); as was also a deed in which

(*h*) Ross *v.* Ross, 1711, M., 16,867—Macfarlane *v.* Grieve, 1790, M., 8459, 17,057—Kilpatrick *v.* Ferguson, 1704, M., 12,061, 17,022—Irvine *v.* M'Jore, 1710, M., 12,284. In this last case the deed had been copied by an ignorant clerk from another deed which had been written by a different person, and the clerk omitted to substitute his own name for that of the writer of the other deed. (*i*) This seems to be Mr Erskine's view; see b. 3, 2, § 12. (*k*) Ersk., 3, 2, 12—Cases in following notes—and *infra*, § 720. (*l*) M'Micken *v.* Kennedy, 1706, M., 16,916.

(*m*) Rules *v.* Craig's Crs., 1712, M., 16,920. (*n*) Murray *v.* Semple, 1714, M., 16,921, affd. on another point, Rob., 282. (*o*) Duncan *v.* Scrimzeour, 1706, M., 16,914.

[11] Where a testing clause bore that the first eight pages of a deed were written by W.J., and the remaining ten pages by G.H., and where an essential part of the deed, occurring on page 15, was in fact written by W.J., it was held that the deed was not probative according to the law of Scotland, though it was argued that the true state of the fact was evident from ocular inspection; Earl of Hopetoun *v.* Scots Mines Co., 1854, reported 1856, 18 D., 739, 747.

the writer was designed as "clerk to the signet," in mistake for "clerk to A B, writer (or clerk) to the signet" (*p*). On the other hand, a deed, the writer of which was merely described as "writer hereof," was held null, as omitting his designation entirely (*r*). And a decree-arbitral, written by the clerk to the submission, was found to be invalid, as not containing the writer's name and designation, although these were mentioned *narrativé* in the body of the document which was signed by him as clerk to the submission (*s*). And where a testing clause bore that the deed was subscribed at Dashers, "before these witnesses, John Murdoch, officer in Dashers, Hugh Mitchell, shoemaker there, and the said George Leny, witness also to the other marginal note on this page, place, date, and writer foresaid," the deed was held null, although Leny was a professional writer, and was well known in the place where the deed was executed (*t*).

§ 709. The act 1593, c. 179, ordains that the writer be named and designed "before the inserting of the witnesses." The deed, however, is valid although their positions should be transposed (*u*). And a testament was sustained, the writer of which was mentioned in the body of the deed merely as a witness, but added to his subscription "witness and writer hereof" (*v*). An assignation was sustained in which the writer was not designed in the testing clause, but by the words "and writer hereof," being added to his subscription as a witness. It was also held not to be too late to complete the deed by making this addition, though it had been produced in a process of competition for an office of executor, and the record had been closed, and an interlocutor pronounced, in which it was referred to in its incomplete state. The point, however, was mixed up with a question of homologation (*x*).[12]

(*p*) Scott *v.* Dalrymple, 1781, M., 8838. (*r*) Kennedy *v.* Oswald, 1710 (not rep.), noted in Rules *v.* Craig's Crs., *supra*. (*s*) Perry *v.* Meikle, 25th November 1808, F. C. (*t*) Lockhart *v.* Kay, 16th February 1815, F. C. The writer was not mentioned in any other place. See also Ross *v.* Ross, 1711, M., 16,867.

(*u*) Ewing *v.* Semple, 1739, M., 1352; 5 B. Sup., 211, S. C. (*v*) Dronnan *v.* Montgomery, 1716, M., 16,869. (*x*) Macpherson *v.* Macpherson, 1855, 17 D., 357.

[12] A settlement by a husband and his wife, conveying heritage, was holograph of the husband except a few lines, which were unimportant, and which were written by the wife. The deed bore to be "written with our own hands" (the number of pages, the date, and the witnesses being mentioned). The Court held (1) that the deed was holograph of the husband; (2) that, in any view, it was duly authenticated, the conveyance of the heritage furnishing a sufficient designation of the writers of the deed; Laurie *v.* Laurie, 1859, 21 D., 240.

§ 710. A deed partly written and partly printed is effectual, provided the person who filled in the written portions is named and designed (*y*).[13]

§ 711. The act of 1593 only requires the writer of the "body" of the deed to be mentioned; whereas the act of 1681 speaks of the writer generally, and requires the witnesses to be designed in the "body of the writ." The proper construction of these provisions is that, as the witnesses' names and designations are part of the body of the deed, the writer of the clause which contains them must be named and designed. But it has been repeatedly held that a deed is valid although the writer of the testing clause is not named and designed, provided the writer of the previous part, the "body," of the deed is properly set forth (*z*). If, however, the testing clause, besides the *res gestae* of the authentication, contains part of the substance of the deed, *e.g.*, a consent by a person having an interest

(*y*) Stirling *v.* E. Glasgow, 1711, 4 B. Sup., 856—Spott's Crs., 1711, M., 16,868—Allardice *v.* Forbes, 1710, M., 16,862. (*z*) Watson *v.* Scott, 1683, M., 16,860—Gray *v.* Scott, 1708, M., 12,602—White *v.* Henderson, 1710, M., 16,864—L. Edmonstone *v.* L. Woolmet, 1722, M., 16,862, note—Andrews *v.* Thomson, 1836, 14 S., 589—Lindsay *v.* Giles, 1844, 6 D., 771.

[13] The 34th section of the Titles to Land Act, 21 and 22 Vict., c. 76, "An Act to simplify the forms, and diminish the expense of completing titles to land in Scotland," provides that "all deeds, writs, and instruments whatever, mentioned or not mentioned in this act, having a testing clause, may be partly written and partly printed or engraved; Provided always, that in the testing clause the date, if any, and the names and designations of the witnesses, and the number of the pages of the deed or instrument, if the number be specified, and the name and designation of the writer of the written portions of the body of the deed, writ, or instrument, and of the written portions of the testing clause, shall be expressed at length in writing; and such deeds, writs, and instruments shall be valid and effectual in the same manner as if they had been wholly in writing." This provision is repeated in the 20th section of the act 23 and 24 Vict., c. 143, extending the provisions of the Titles to Land Act to lands held by burgage tenure. The interpretation clause, section 36 of the act 21 and 22 Vict., c. 76, declares that the word "deed" shall include the various forms of deeds specially mentioned, "and other deeds and decrees by which lands are conveyed, or rights in land are constituted or conveyed;" "and all codicils, deeds of nomination, decrees of declarator, and other writings bearing reference to conveyances separately granted, and naming or appointing persons to exercise or enjoy the rights or powers conferred by such conveyances, shall be deemed and taken, for the purposes of this act, to be part of the conveyances to which they separately bear reference." And the word "instrument" is declared to include all notarial instruments authorised by the act, and also instruments of sasine. The word "writ" is not defined in the act. There is an analogous clause, section 2, in the act 23 and 24 Vict., c. 143.

in it, the writer of that portion must be named and designed, otherwise it will be null (*a*).[14]

§ 712. C—*Mentioning the fact of subscription.*—The testing clause, of course, should state distinctly that the parties signed the deed in presence of the witnesses, at the place and on the day specified; and when the execution is notarial, the testing clause should run in the same terms as when the party signs with his own hand, the subscription by the notaries being set forth in their docquet (*b*).

§ 713. But considerable errors in the narrative of the subscription will be overlooked, if they do not destroy its true meaning. Thus deeds have been sustained which were stated to have been "written," not "subscribed," in presence of the witnesses (*c*); and where the names and designations of the witnesses were inserted without any statement that the deed had been signed before them, each of their subscriptions having the word "witness" added to it (*d*). Deeds by two persons have also been held effectual, where the literal meaning of the testing clause was that only one of them subscribed (*e*).

§ 714. D—*Mentioning the date, and place of execution.*—The constant practice of conveyancers is to set forth in the testing clause the date of execution; and this ought always to be done, because it makes the deed effectual as of the date which it bears, until that is proved to be false. But mentioning the date is not a statutory requisite; and therefore it is not indispensible to the

(*a*) See Johnstone *v.* Coldstream, 1848, 5 D., 1297. (*b*) Bell on Testing Clause, 169—Duff Feud. Con., 13. (*c*) M'Ildownie *v.* Graham, 1712, M., 16,931—Gordon *v.* Murray, 1765, M., 16,818—Sinclair *v.* M'Beath, 1788, Hume D., 773—Millers *v.* Baikie, 1829, 7 S., 444. (*d*) Doig *v.* Ker, 1741, M., 16,900—Wemyss *v.* Hay, 1 S., 47; affirmed, 1 W. S., 140. (*e*) Orr *v.* Wallace, 1712, M., 16,919—Taylor *v.* Braco, 1748, M., 16,813, Elch., "Writ," No. 21, S. C.—Dunbar *v.* Innes, 1759, M., 11,644. The two first of these cases occurred in regard to cautionary obligations in which there was *rei interventus*, although that doctrine is not properly brought out in the reports; and, in the other case, of Dunbar *v.* Innes, the Court went partly on the circumstance that the deed had been signed in counter-part. See also Broomfield *v.* Young, 1752, M., 16,817; *infra*, § 721.

[14] Mortgages and bonds by railway companies, stamped as directed in the act 24 and 25 Vict., c. 50, may be assigned by endorsement. The form of testing clause to the endorsement given in the act makes no mention of the writer of it.

validity of a deed (*f*). Consequently, when a deed is not dated, a party founding on it as of a certain date may prove his averment *prout de jure* (*g*). And if a deed is misdated through mistake or without a fraudulent design, it is good as of its true date, which may be proved by extrinsic evidence (*h*).

§ 715. But it has been repeatedly held that misdating for a fraudulent or improper purpose is fatal to a deed, in so far as it might confer benefit on any person privy to the fraud (*i*). Mr Tait thinks that "it may deserve consideration how far a deed, admitted or proved to be genuine, ought to be cut down entirely on account of the falsehood of the date, and whether it might not be sufficient to hold it to be of a date the most unfavourable to the party founding upon it." Yet even in this modified view, as well as in the strict rule followed in the decisions, there seems to be a want of proper discrimination between the civil and the criminal qualities of the act of misdating. To refuse any effect to a misdated deed, or to attribute to it the date most unfavourable to the party, when that is clearly not its true date, is to decide against the real facts in regard to a matter of civil right and of evidence, on account of considerations of a criminal and penal character; while so indiscriminate a mode of treating such frauds or misdemeanours might inflict too great punishment in some cases, and too small in others. The correct principle seems to be, that a misdated deed should be received as of its *real* date, and that the question whether any, and

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(*f*) Wemyss *v.* Hay, 1821, 1 S., 47; affirmed, 1 W. S., 140—Grant *v.* Grant, 1662, M., 11,497—Bayne *v.* Caivie, 1673, M., 11,540—Elphinstone *v.* L. Cranstoun, 1682, 2 B. Sup., 12—and cases in M., 16,896; 16,925, *et seq.;* 16,970.

(*g*) Tait Ev., 138—Fletcher, 1681, 2 B. Sup., 7—Hamilton *v.* Sinclair, 1621, M., 16,925—Thornton *v.* Milne, 1665, M., 12,277. So where marginal additions are not specified in the testing clause, they must be proved to have been signed the same day as the deed, if their effect depends on their dates; L. Durie *v.* Gibson, 1667, M., 16,927—Johnstone *v.* Johnstone, 1688, M., 17,063. (*h*) Arnot *v.* Gairden, 1730, M., 12,285—L. May *v.* Ross, 1667, M., 12,279—Yeats *v.* Yeats' Tr., 1833, 11 S., 915—Campbell *v.* Fisher, 1838, 16 S., 1279—Winram *v.* Anderson, 1629, M., 6749. See also Simpson *v.* Archbishop of St Andrews, 1683, 2 B. Sup., 44.

(*i*) So held where a deed had been antedated to defeat the plea of deathbed; Merry *v.* Howie, 1801; affirmed 1806, M., "Writ," App., No. 3;—and to defeat an inhibition; Edmiston *v.* Sime, 1636, M., 17,062;—and to give an undue preference to an assignation, M'Math *v.* Oliphant, 1674, M., 12,665; 3 B. Sup., 36, S. C.—Home *v.* Brown, 1672, 2 B. Sup., 685—See also Keith *v.* Robertson, 1626, M., 12,271. But see M'Kenzie *v.* Fraser, 1743, Elch., "Writ," No. 16, where a bill granted in March 1716, but dated August 1715, to avoid the objection that the granter was in rebellion at its date, was sustained on proof of onerosity. It seems to have been challenged by the granter; but the report is not clear on that point.

what, penalty should be inflicted for the wrongful act, ought to be matter of separate investigation. This, moreover, is the only way in which the fine to be imposed for the fraud would be secured to the fisk, instead of going to a private person, who has no just right to it.

§ 716. A third party not implicated in the fraud would, of course, be entitled to use a misdated deed as of its true date.

§ 717. A deed executed on Sunday is valid (*k*).

§ 718. The place where the deed is executed is generally mentioned in the testing clause. This is often of great use in questions of authenticity; but, not being a statutory requisite, it is not indispensible (*l*).

§ 719. E—*Mentioning the names and designations of the witnesses.*—The insertion of the designations of the witnesses was first required by the act 1579, c. 80; which enjoined that notarial subscription for persons who could not write should be "before four famous witnesses, denominate be their special dwelling places, or sum uther evident tokens, that the witnesses may be knawen, being present at that time, otherwise the sadis writs to make na faith" (*m*). The sanction of this act was enforced in cases of notarial subscription (*n*), to which the act was limited (*o*). But in subscription by the parties themselves the names and designations of the witnesses, if omitted, were allowed to be supplied by a condescendence and proof (*p*), until the act 1681, c. 5, enacted and declared that all writs to be subscribed by any party after its date, "wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses" (*r*).

§ 720. Under this statute the Court have repeatedly held deeds null, in which the witnesses were either not designed at all, or were

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(*k*) Duncan *v.* Bruce, 1684, M., 15,003—Yeats *v.* Yeats' Tr., 1833, 11 S., 915—Elliot *v.* Faulke, 1844, 6 D., 411. (*l*) Vallance *v.* M'Douall, 1709, M., 16,930—Ogilvie *v.* Baillie, 1711, M., 16,896; 16,930, S. C.—Wemyss *v.* Hay, 1821, 1 S., 47: affirmed, 1 W. S., 140. (*m*) See the act quoted at length, *supra*, § 689.

(*n*) Sherriff *v.* Henderson, 1623, M., 16,877—Low *v.* Beatson, 1738, M., 16,899; 17,032. (*o*) Erskine (b. iii, t. 2, § 11) considers that the plain intendment of the act 1579, was that the witness should be designed where the party signed with his own hand, and that the words of the act admit of that construction. This, however, may well be questioned—See 1 Ross Lec., 128. (*p*) Ersk., 3, 2, 11; 3, 2, 19—1 Ross Lec., 129. (*r*) See the act quoted *supra*, § 642.

designed erroneously (*s*). What is a sufficient designation is not mentioned in the statute. It ought evidently to be such a description of the witness' business (if he has any), and residence, as properly identifies him. But the Court have sustained much more meagre designations, and have eked them out by inferences which, perhaps, are hardly warranted by the terms of the statute. Thus the designations "Merchant," and "Chirurgeon" (*t*), and "Doctor of Medicine" (*u*), have been held sufficient; the Court presuming that the witnesses followed their respective callings in the place where the deed was signed. So the designation "Writer" has been sustained, on the supposition that it was used in its common signification of law-agent, and that the witness followed that avocation in the place where the authentication took place (*x*). But "Esquire" has been held not to be sufficient (*y*). A disposition was sustained where one of the witnesses was described as "Robert Rollo, indweller in Edinburgh"; the party, however, being ordained to "condescend and design him" more specially (*z*). As the name was unusual, there would be little difficulty in discovering the witness in this case. But a similar designation with a common name, such as "John Smith" or "James Campbell," would not suffice; and the designation "indweller in London" would be inadequate, unless the witness was a well-known person, as, for example, Thomas Babington Macaulay, or Charles Dickens.[15]

§ 721. Deeds have been sustained where the designations of both witnesses were merely "in Inverasragan (*a*), and "at Auchterhouse" (*b*), without any connecting words; the Court holding that the witnesses were meant to be described as residing in the places named. So a testing clause which bore that the deed was signed "before these witnesses, the said Thomas Jamieson, writer hereof, and Alexander Jamieson, at Leckie," was construed as meaning that both witnesses resided at that place; although it was pleaded

(*s*) Besides the cases in the following notes, see those as to the designation of the writer of the deed, *supra*, § 708. (*t*) Reid *v.* Brown, 27th June 1700 (not rep.), noted in Rules *v.* Craig's Crs., 1712, M., 16,920. (*u*) Innes *v.* Innes' Trs., 1800, Hume D., 911. (*x*) Rules *v.* Craig's Crs., *supra*.

(*y*) Humbie *v.* Humbie, 1736, Elch., "Writ," No. 3. (*z*) Grant *v.* Keir, 1698, M., 16,913—See also Baillie *v.* Somervel, 1672, M., 16,913.

(*a*) Wallace *v.* Campbell, 1749, M., 16,900. (*b*) Duncan *v.* Scrimzeour, 1706, M., 16,914.

[15] "The proper designation of any person is a statement of his present occupation and residence"; Lord Justice-Clerk (Inglis) in Joel *v.* Gill, 1859, 22 D., p. 12.

not unfairly, that the proper designation of Thomas Jamieson (who was not mentioned in a previous part of the deed) had been omitted (*c*). But where the witnesses were described as "Gilbert Elliot, inserter of the sum, and Archibald Nelson, servitor to the laird of Cavers," the deed was held null; and the Court refused to read "servitors" in place of "servitor," which was the proper designation of both witnesses (*d*). In another case, where the deed bore to have been signed "before these witness, Robert Brown in Ednam and John Fish in Castlelaw, writer hereof, and witness to the marginal notes also," the objection that there was only one witness to the marginal notes was repelled, because the writer of the deed had used "witness" in the plural number in a previous part of the clause, and there could be no doubt that he meant to include both of the witnesses when he repeated the term (*e*). In a recent case a deed was sustained which bore to have been "written by Thomas M'Glashan, apprentice to James Carstairs and Son, town-clerks of Cupar, subscribed before and in presence of the said James Carstairs, Junior," (whose name did not occur before); the Court presuming that he was the junior partner of the house (*f*).

Where one of the witnesses to a bond was designed "brother german," in mistake for "brother in law," of a person properly named and designed, the deed was held null, although there could be no doubt that *constabat de persona* (*g*).

§ 722. With regard to the *names* of the witnesses, it will be observed that the acts 1579, c. 80, and 1681, c. 5, do not expressly require these to be inserted; in which respect they differ from the act 1593, c. 179, which ordains the "name, surname, and particular remaining place," &c., of the writer to be mentioned. The reason for this distinction may perhaps have been, that as the witnesses' names appeared in their subscriptions, their identification would be complete, if only their designations were mentioned in the testing clause; whereas the writer of the deed could not be identified unless both his name and designation were set forth. But whether the omission in the acts 1579 and 1681 arose from design or from oversight, it is thought that a deed would be valid in which the witnesses were designed, but not named; *e.g.*, where the testing clause bore that the deed was signed "before the witnesses sub-

(*c*) Jameson *v.* Sheriff, 1708, M., 16,916. (*d*) Halden *v.* Ker, 1714, M., 16,924, affd., Cr. and St., 51. (*e*) Broomfield *v.* Young, 1752, M., 16,817.

(*f*) Donaldson *v.* Stewart, 1842, 4 D., 1215. (*g*) Graham's Crs. *v.* Grierson, 1752, M., 16,902.

scribing, who are both writers to the signet in Edinburgh." As, however, this view has not received the sanction of the Court, and as the universal practice is to mention both the names and the designations of the witnesses, that ought always to be done (*h*).

§ 723. If the names of the witnesses are mentioned, a material error in stating them is fatal to the deed; whereas slighter inaccuracies are overlooked, *si constat de persona.* Thus, on the one hand, where the christian name of one of the witnesses to a deed was stated as "Thomas" in place of "Francis," and in another case where he was named "John" instead of "Robert," the deed fell, although the designation pointed out who had been intended (*h*)*; and a similar result followed where a witness signing "Thomas Hill" was described as "Thomas Hillock," the name by which he was familiarly known, and by which he had formerly been accustomed to subscribe (*i*). On the other hand, a deed was sustained where one of the witnesses, who signed "Wm. C. Davys," was mentioned in the testing clause as "Major W. C. Davis of Colonel French's Levy" (*j*); and an instrument of sasine in the old form was held valid under the act 1681, c. 5, where the witnesses subscribing as "William Moir" and "Alexander Garrock" were mentioned in the testing clause as "William Moor" and Alexander Garvock," their designations being correct (*k*). This decision goes far, as the names inserted in the deed were not different modes of spelling those of the witnesses, but were really different names.

§ 724. F—*Mentioning marginal additions, erasures, &c.*—An important use of the testing clause is to mention the marginal additions, erasures, deletions, or other blemishes (if there be any), on the integrity of the writing (*l*). These ought to be specified clearly and minutely. If there are marginal additions, the testing clause ought to state the pages on which they respectively occur, and that they were signed by the parties before the witnesses who attest the deed. In mentioning words written on erasure, some conveyancers are accustomed merely to state their number and the lines of the pages where they appear. But this is a loose and dangerous prac-

(*h*) In Morton *v.* Hunter & Co., 1828, 7 S., 172; affd., 4 W. S., 379, an erasure in the christian name of a witness was held not to be a nullity under the act 1681, c. 5.

(*h**) Douglas, Heron, & Co. *v.* Clark, 1787, M., 16,908—Abercromby *v.* Innes, 1717, M., 17,022. (*i*) Archibald *v.* Marshall, 1787, M., 16,907; Hailes, 1035, S. C. This decision may be questioned. (*j*) Dicksons *v.* Goodall, 1820, Hume D., 925.

(*k*) Stewart *v.* Stewart, 2d March 1815, F. C. (*l*) Ersk., 3, 2, 20—Ross Lec., 143—Duff Feud. Con., 22—Tait Ev., 75.

tice, as it would be easy to erase the words so mentioned, and to substitute for them others of the same number but materially different in meaning, without the testing clause furnishing materials for detecting the fraud. The only safe course, therefore, is to repeat in that clause the words which have been written on erasure, mentioning the places in the deed where they occur, and stating that they were so written before the deed was subscribed. If any words are deleted they should be specified in the same way.

§ 725. When the testing clause mentions the alterations distinctly, in the mode above mentioned, the deed is probative in its altered state, and any one who alleges that the alterations were made after subscription or for a wrongful purpose, must bear the burden of proving that averment.

How far deeds containing erasures or marginal additions will be sustained, where the testing clause does not comply with these requisites, is considered afterwards (*m*).

§ 726. G—*Of completing the testing clause.*—According to strict principle the testing clause of a deed ought to be completed either before its authentication, or immediately afterwards, in presence of the parties and witnesses subscribing (*n*). But this rule could not be followed in practice without causing great inconvenience; as many deeds are executed at a distance from the conveyancer's place of business, and when neither the writer of the deed nor any other competent person is at hand to complete it. The practice therefore is to leave a blank for the date and place of execution, and the names and designations of the witnesses, and to insert these particulars as soon as can conveniently be done after execution. The difficulty of defining any precise time within which the testing clause may be completed, and the absence of any statutory rule on the point, have led to considerable laxity both in the practice of conveyancers, and in the decisions of the Court, in this class of cases. An assignation was sustained in which the writer was not designed in the testing clause, but by the words "and writer hereof" being added to his subscription as a witness. It was also held not to be too late to complete the deed by making this addition though it

(*m*) See *infra*, § 731, and chapter on vitiations in writings, Part ii, b. i, t. 1, c. 6.

(*n*) Every deed involves an anachronism; because where the testing clause is completed before the execution, it narrates as past what has still to take place; while, on the other hand, if the subscription and attestation are adhibited before completing the deed, they give probative effect to the narrative which is afterwards inserted above them, and with the terms of which the parties and witnesses are seldom made acquainted.

had been produced in a process of competition for an office of executor, and the record had been closed, and an interlocutor pronounced in which it was referred to in its incomplete state. The point, however, was mixed up with a question of homologation (*n**).

§ 727. The only limit which has yet been prescribed on the point is, that the testing clause may not be completed after the party has raised action or execution upon the deed, or has placed it beyond his control in a public register (*o*). Thus a marriage-contract was sustained, although the testing clause had not been completed until after both the spouses had died, and until eleven years after the date of the deed (*p*). Thus, also, a deed of ratification, the testing clause of which was filled up after an interval of thirty-two years, was held effectual (*r*). In another case the testing clause of a cash credit bond had been inserted immediately upon subscription; but after the deed had been for a considerable time in the custody of the creditor, and after the principal debtor had become bankrupt, it was observed that the name of one of the witnesses had been engrossed erroneously; whereupon an addition was made to the testing clause in the following terms—"I say Robert Dickson, his servant, the word 'Gibson' being a chirographical error of the writer in filling up the last line of the testing clause; all written by the said James Fraser," who had written the body of the deed. It was strongly pleaded that such an alteration on a completed deed could not be made *ex intervallo*. But the Court unanimously repelled the objection on the ground that the testing clause might be completed, or errors in it corrected, any time before producing the deed in judgment (*s*). Again, where a deed, in which the name of one of the witnesses appeared as Crammo*r*d, had been given in for registration in the books of Council and Session, had been entered in the minute book, and an extract of it had been issued, as if it had been recorded; but where before it had been actually engrossed in the register, the party borrowed it up in terms of the act 1685, c. 38, within six months of presentment, and added a clause mentioning that the name of the witness was Crammo*n*d, and where it was pleaded that the deed could not

(*n**) Macpherson *v.* Macpherson, 1855, 17 D., 357. (*o*) Bell's Pr., § 2226—More's Notes, 406—Tait Ev., 104—Duff Feud. Con., 19. See Dury *v.* Dury, 1758, M., 16,936; Elch., "Writ," No. 27, S. C., *supra*, § 656, as to a deed in which the testing clause was crowded in above, and was partly below the signatures.

(*p*) Dick's Tr. *v.* Dick, 1798, Hume D., 908. This case was not decided on the ground of the *rei interventus* arising from the marriage. (*r*) Blair *v.* Stewart, 1827, 6 S., 51. (*s*) Bank of Scotland *v.* Telfer's Crs., 1790, M., 16,909.

be so altered after having been given in for registration, and after the granter's death,—the Court of Session and the House of Lords repelled the objection (*t*). The reason was, that the deed had not been beyond the party's control when it was borrowed up and corrected. On the converse of this principle, the testing clause of a deed cannot be completed or altered after it has been presented for registration in the books of a Sheriff Court; as there is no corresponding power to borrow up deeds from these records (*u*).

The case where the Court seem to have gone farthest in sustaining deeds completed *ex intervallo*, was one in which they repelled the objection to an instrument of sasine, that it proceeded on a disposition, the testing clause of which was not completed until some time after the sasine had been expede (*x*). The ground of judgment, as appearing in the note of the Lord Ordinary (McCreiff), was, that both the disposition and the instrument being formal *ex facie*, they could not be challenged in the hands of a third party on the ground of such a latent objection, which did not imply fraud; that the delivery of the deed was a warrant to the granter to complete the testing clause; and that when a deed contained a formal testing clause it must be presumed *juris et de jure* to have been completed at the proper date (*y*).[16]

§ 728. But while these cases show that the completion of the testing clause *ex intervallo* is not incompetent, such an irregularity ought in all cases to be avoided, and has been disapproved of in the House of Lords (*z*). Nor can it be doubted that if a deed was impugned on the ground that erasures or additions mentioned in the testing clause had been made after subscription, the circumstance that that part of the deed had been filled in at a considerable interval, and out of the presence of the granter of the deed, would be materially injurious to its validity (*a*). It will also be a proper

(*t*) Macleod *v.* Cunninghame, 1841, 3 D., 1288; affd., 5 Bell's Ap. Ca., 210. Both the Court of Session and House of Lords were influenced by a report upon the practice in the register office. (*u*) Brown *v.* Rankine, 11th March 1809, F. C.—Barclay *v.* Brown, 1811, Hume D., 923. (*x*) Leith Bank *v.* Walker's Tr., 1836, 14 S., 332. (*y*) See also per L. Just.-Clerk in Johnstone *v.* Coldstream, 1843, 5 D., 1305—Shaw *v.* Shaw, 1851, 13 D., 877. (*z*) Per L. Brougham in Kedder *v.* Reid, 1840, 1 Rob. Ap., 183. (*a*) See Boswell *v.* Boswell, 1852, 14 D., 886, per

[16] In a recent case, it was held that a transfer of shares of stock was sufficiently tendered though the testing clause was not filled up; and it was observed, in conformity with the law in the text, that a party who subscribed a deed, leaving a blank for the testing clause, and delivered it, gave a mandate to fill up the testing clause; Rait *v.* Primrose, 1859, 21 D., 965. But see M'Neille *v.* Cowie, *infra*, note [17], where it was averred that no blank had been left for the testing clause.

ubject for inquiry regarding a deed completed after a long interval, whether there were sufficient materials for filling it up in accordance with the facts.

§ 729. It is irrelevant to challenge a signed and completed deed on the ground that the parties intended it should remain blank in the testing clause and improbative (*b*).[17]

XIII. *Of the Authentication of Marginal Additions and Interlineations.*

§ 730. When any addition requires to be made to a deed before subscription, it ought to be written on the margin and signed by the party with his name divided on each side of it; and it ought also to be mentioned in the testing clause, in the mode described in a previous section. Some conveyancers also require the instrumentary witnesses to sign such additions (*c*); a precaution which certainly increases their probative value, although it is neither required by statute nor adopted in general practice. As there is no statutory rule for the authentication of marginal additions, interlineations, and the like, there is some doubt as to the consequence of omitting any of the customary safeguards for their genuineness.

§ 731. The party's signature, or at least his initials, to marginal additions seem to be indispensible, even where they are mentioned in the testing clause; because such detached words are not authenticated by merely subscribing the page, nor does the mention of them in the testing clause suffice to import them into the deed (*d*).

L. Just.-Clerk Hope. (*b*) Shaw *v.* Shaw, *supra.* (*c*) See Duff Feud. Con., 22. This seems sometimes to have been considered necessary unless there had been homologation, or the deed had been signed in counter-part; see Bruce *v.* Bruce, 1770, M., 10,805; affirmed, 2 Pat., 258—Boswal *v.* Boswal, 1708, M., 17,025—A B, 1752, 5 B. Sup., 808. (*d*) See 1 Ross Lec., 143—Duff Feud. Con., 22—Miller *v.* Lambert, 1848, 10 D., 1419—Carnegie *v.* Ramsay, 1795, 4 B. Sup., 242—Bruce *v.* Stewart, 1666, 2 ib., 427.

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[17] The decision in the case of Shaw *v.* Shaw has been doubted, and is not reconcileable with the case of M'Neille *v.* Cowie, where, when a pursuer averred that he had sent to the defender a signed offer for a lease, which he afterwards withdrew, and that after he had withdrawn it, the defender wrote a testing clause between the end of the document and the pursuer's signature—the Court allowed him an issue, Whether the document was delivered as a completed document to the defender before the testing clause was added? and Whether the defender, without the knowledge of the pursuer, wrongfully added to the testing clause the words in question? M'Neille *v.* Cowie, 1858, 20 D., 1229; 30 Scot. Jur., 727.

But when deeds are signed in counter-part, a marginal addition on one of the duplicates, although unsigned, will be binding on the party who produces that copy (*e*); whereas it will not be sustained in his favour (*f*). An addition holograph of the granter of the deed is binding, although unsubscribed (*g*). In one case a bond, which from its whole scope and tenor had evidently been meant to provide an annuity of 300 merks, was sustained to that extent, although the word "yearly" occurred only on the margin, and was not signed (*h*).

§ 732. It is not essential for the testing clause to mention that the marginal addition was signed by the party or before the instrumentary witnesses; the general statement as to the execution applying to it, as well as to the body of the deed (*i*). And for the same reason, it is not indispensible to mention who is the writer of the addition (*k*). But if ocular inspection shows that it was not written by the writer of the body of the deed, it will fall, unless it is holograph, or the writer of it is named (*l*). It was once held that a marginal addition, signed by notaries along with the rest of a deed by a person who could not write, was not binding, because their authority to sign it was not set forth (*m*). But this decision may be questioned, as the general statement of authority seems to cover the subscription of these as well as the main part of the deed (*n*).

§ 733. It has been held that a marginal addition, whether holograph or signed by the party, is not probative of its date, unless it is mentioned in the testing clause or signed by the instrumentary witnesses (*o*).

§ 734. These remarks apply also to interlineations; which are effectual when signed by the party, and mentioned in the testing

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(*e*) Stair, 4, 42, 19 (3)—Ersk., 3, 2, 20—Smith *v.* D. Gordon, 1701, M., 16,987—Boswal *v.* Boswal, 1708, M., 17,025. (*f*) Stair, *supra*—Ersk., *supra*.

(*g*) See Bruce *v.* Stewart, *supra*—Horsburgh *v.* Horsburgh, 1848, 10 D., 824.

(*h*) Stewart *v.* Bruce, 1666, 1 B. Sup., 529. (*i*) Cuming *v.* Aberdeen Presbytery, 1721, Rob. Ap. Ca., 364—Spottiswood *v.* Prestongrange's Crs., 1741, M., 16,811; 5 B. Sup., 709, S. C.—King *v.* Greenock Bank, 1836, 14 S., 351—See also Bruce *v.* Bruce, 1770, M., 10,805; affirmed, 2 Pat., 258—Broomfield *v.* Young, 1752, M., 16,817, noted *supra*, § 721. (*k*) Cuming *v.* Aberdeen Presbytery, *supra*—Spottiswood *v.* Prestongrange's Crs., *supra*. (*l*) See L. Durie *v.* Gibson, 1667, M., 16,927.

(*m*) Elliots *v.* Riddle, 1695, M., 16,838. (*n*) See *supra*, notes (*i*), (*k*).

(*o*) L. Durie *v.* Gibson, 1667, M., 16,927—Johnstone *v.* Johnstone, 1688, M., 17,063. Lord Stair thinks it doubtful whether the marginal addition, even when signed by both the party and the witnesses, will be held as of the date of the deed, if it is not mentioned in the testing clause; Stair, 4, 42, 19 (3).

clause, but are subject to the same objections as marginal additions, when either of these formalities is omitted.

XIV. *Of Marking each Page of the Deed with its Number.*

§ 735. The act 1696, c. 15, requires that the pages of deeds written bookwise be "marked with the numbers first, second, &c.;" and this direction is followed in practice by marking the top of each page with its number in words. But deeds have been sustained where the numbers were only in figures (*p*); and where the numbers of some of the pages were written in words on erasures, the pages being undoubtedly continuous, as shown by the catchwords, and the number of them being properly mentioned in the testing clause (*r*). From this decision it would seem that the omission to number the pages would not be visited with nullity, provided their continuity and genuineness were unquestionable (*s*). Their number does not require to be mentioned in deeds which extend over only one sheet, although consisting of several pages (*t*).[18]

(*p*) E. Cassilis' Tr. *v.* Kennedy, 1831, 9 S., 668. (*r*) Wood *v.* Ker, 1838, 1 D., 14. (*s*) See *supra*, §§ 704, 5. (*t*) See *supra*, §§ 659, 704.

[18] The case of Wood *v.* Ker hardly warrants the inference in the text. But this is of little consequence, as it is now unnecessary to page deeds in any way. In a recent case, Lord Cowan held that an unpaged deed, if held to be a Scotch deed, was improbative and null; the number of pages was, besides, stated erroneously in the testing clause; and the First Division found that the deed had not been executed in conformity with the statutory solemnities, and could not receive effect as a deed probative by the law of Scotland; Earl of Hopetoun *v.* Scots Mines Co., 2d June 1854; reported 1856, 18 D., 739. In Thomson *v.* MacCrummen's Trustees a deed written on seven pages was reduced as not authenticated because the pages were not numbered, although their number was stated correctly in the testing clause, and at the bottom of each page there was a catchword. The House of Lords held that the provisions of the statute were imperative, and affirmed the judgment; Thomson *v.* MacCrummen's Trustees, 1856, 18 D., 470; affirmed and reported under the name of Galbraith and others (MacCrummen's Trustees) *v.* the Edinburgh and Glasgow Bank, 1859, 31 Scot. Jur., 425.

But after the judgment in that case in the Court of Session, and before the judgment in the House of Lords, the act 19 and 20 Vict., c. 89, was passed, providing that after 1st September 1856 it shall not be competent to challenge any deed on the ground that the pages are not marked by numbers; the act provides that it shall not be construed "to affect any question which may have been in dependence in any Court prior to the passing of this act, or any judgment already pronounced, or any decree which has already gone out, or the provision of the said recited act (1696, c. 15), or of any other act or acts of Parliament as to mentioning in the testing clause the number of the pages of which the deed consists, or the provision as to signing each page of the deed, or any other provision of the said recited act."

XV. *Of Ratification of Deeds by Married Women.*

§ 736. In olden times much inconvenience arose from deeds by married women, although granted to third parties and for onerous causes, being reducible on slight proof of marital influence. To remedy this evil it became the practice to get wives to ratify their deeds on oath before a judge, and out of the presence of their husbands. This proceeding received the authority of the legislature in the act 1481, c. 83; which, adopting a decision of the Lords of Council, enacted that "ane woman conjunct fear, makand faith (swearing) that scho sall never cum against the alienation thereof, sall nocht be hearde afterwards to impugne the said alienation." There is, however, no statute which enjoins judicial ratification, as a solemnity in deeds by married woman (*u*).

§ 737 The ratification used to be emitted before a judge in open Court. It now takes place in presence of any magistrate or justice of peace at his private residence (*x*); the wife appearing before him, along with a notary and two witnesses, and emitting a solemn oath and declaration that the deed is subscribed by her voluntarily, and that she will not challenge or impugn it (*y*). In Erskine's time it was becoming the practice to use the wife's declaration, instead of her oath; but that learned author doubts the sufficiency of such ratifications (*z*). They would probably not be sustained, unless emitted by persons having right by statute to offer declarations instead of oaths.

§ 738. The procedure is usually recorded in a notarial instrument (*a*); which is indorsed on the deed, and is signed by the wife, the magistrate and notary, and two witnesses. But some conveyancers dispense with the attendance of a notary, and use simply a narrative of the ratification, signed by the wife, the magistrate and the witnesses (*b*). If the husband was present, the ratification is null; as it is presumed to have been emitted under his influence (*c*).

(*u*) The subject of these sections is fully treated by Mr Fraser in 1 Pers. and Dom. Rel., 433, *et seq.* (*x*) Ersk., 1, 6, 33—1 Fraser, 433—Duff Feud. Con., 188. Being an act of voluntary jurisdiction, the ratification may take place before a judge or magistrate within whose territory none of the parties reside. Ersk., ib.; Fraser, ib.; Wallace, 219. (*y*) It was supposed that the oath had been abolished by the general words of the act 5 and 6 Will. IV, c. 62. But the act 6 and 7 Will. IV, c. 43, declares that the ratification should proceed on oath as formerly. (*z*) Ersk., *supra.* (*a*) Ersk., 1, 6, 34—Duff Feud. Con., 188. (*b*) 1 Fraser, 434.

(*c*) Ersk., *supra*—Bank., 1, 5, 76—Mack. Inst., 1, 6, 14 (vol. ii, 287)—1 Fraser, 434.

Nay more, it seems to be essential to the validity of the ratification that his absence be set forth (*d*).

§ 739. The ratification, being a formal ministerial act, cannot be proved by parole (*e*). It is incomplete without the signature of the wife, or of two notaries subscribing for her if she cannot write (*f*).

§ 740. As this ceremony is not enjoined by statute, it is not essential to the validity of a deed granted by a married woman. Its purpose is not to authenticate the subscription, but to prove that the deed, admitted to be genuine, was not extorted from the granter by force or fear of her husband. Accordingly, a deed which wants this solemnity is valid, until reduced by the wife on the ground that her husband coerced her to grant it; and the want of the ratification is only a circumstance, although a highly important one, tending to prove coercion (*g*). Professor Bell is therefore in error, when he states that deeds by a wife "are presumed to proceed from her husband's undue influence, the presumption being counteracted by her judicial ratification" (*h*).

In an action by a mother against her son for proving the tenor of a deed executed by her during her husband's life, the facts of her having the deed cancelled in her hands, and not having ratified it, were held to raise a presumption that she had cancelled it herself (*i*).

§ 741. On the other hand, a deed which has been formally ratified cannot be challenged on the ground that the granter was coerced by her husband into signing it; and therefore an action of reduction on that head would be dismissed as irrelevant (*k*). But if the wife averred that the ratification, as well as the deed, was

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(*d*) Erak., *supra*—Fraser, *supra*. (*e*) Mitchelson *v.* Mowbray, 1635, M., 5960; 6073; 1 B. Sup., 354, 357; S. C.—Swinton *v.* Brown, 1668, M., 8412; 8408; S. C. —1 Fraser, 434. (*f*) Bell *v.* Mow, 1636, M., 12,526—Gordon *v.* Maxwell, 1678, M., 12,583. Authorities in preceding note. But see Arnot *v.* Scott, 1673, M., 6091. (*g*) Buchan *v.* Risk, 1334, 12 S., 511—Hepburn *v.* Nasmyth, 1613, M., 6069—Stuart *v.* Hutchison, 1681, M., 7762—Johnstone *v.* Napier, 1708, M., 16,511—Hay *v.* Cumming, 1706, M., 16,506—Smith *v.* M'Keand, 4th June 1835, 7 Sc. Jur., 397—Erak., 1, 6, 36—Bankt., 1, 5, 76—1 Bell's Com., 143, note 1—1 Fraser, 435—Duff Feud. Con., 189. In Macdougall Brisbane, 1st March 1850, 12 D., 917, the Court authorised an instrument of disentail by a married woman to be judicially ratified *ob majorem cautelam;* but were of opinion that the proceeding was unnecessary, as the estate was to be acquired by her in fee-simple, and not by a third person, or in any degree by her husband. (*h*) Bell's Pr., § 1615. (*i*) Houston *v.* Schaw, 1711, Rob. Ap. Ca., 561. (*k*) 1481, c. 83—Mack. Inst., 1, 7, 14 (vol. ii, p. 287)—Craig, 2, 22, 15—Erak., 1, 6, 34—1 Bell's Com., 143—Bankt., 1, 5, 76.

extorted from her *vi et metu* of her husband,—is the formal act so absolutely *probatio probata* of free consent that it cannot be counteracted by any proof, however convincing? In one case the Court found the ratification "sufficient to purge all action *super metu*, although the woman replied that the same ratification and oath were extorted also, *per eandem vim et metum*" (*l*). This decision is in accordance with the unqualified opinion of Craig (*m*), that a wife is not to be heard in challenge of her judicial consent; while Mackenzie also holds that the ratification absolutely bars challenge "*propter religionem sacramenti*" (*n*); and Bankton (*o*) lays down that it excludes reduction, although she was actually compelled. This view, however, which only allows redress where the coercion is slight, and not where it is extreme, is challenged by Erskine (*p*) as "contrary to the rules of reason and repugnant both to the canon law (*r*), which gives conclusive effect only to such ratifications as are made *sine vi aut dolo*, and to the principle on which our practice is founded; for if the law accounts all ratifications made by the wife in her husband's presence null from a presumption that she is thereby laid under undue influence, it must *a fortiori* reject such ratifications as shall appear upon positive evidence to have been actually extorted from her *ex vi aut metu* of the husband." It was perhaps on this ground that the Court once sustained a reduction of an infeftment, *super capite metus reverentialis*, although it had been judicially ratified (*s*). Professor Bell observes that there seems to be no doubt that a ratified deed cannot be challenged on the ground referred to, unless the party taking benefit by the deed should be proved to have been participant in the violence, or at least to have had notice of it (*t*). In this conflict of authorities the question may be considered as open and doubtful (*u*).[19]

(*l*) Grant, 1642, M., 16,483. (*m*) Craig, 2, 22, 15. (*n*) Mackenzie, *supra*. (*o*) Bankt., 1, 5, 79—ib., 1, 5, 76. (*p*) Erak., 1, 6, 34.

(*r*) Decretal, 2, 24, 28. Mr Fraser observes (i, 436) that this passage does not bear out Erskine's statement, although the *gloss* upon it does. But the text of the decretal means that only such ratifications are binding as are emitted "*sine vi aut dolo, sponte*."

(*s*) A *v.* B, 1612, M., 16,481. (*t*) 1 Bell's Com., 143. The learned Professor observes that Erskine's doctrine is against the decision on which the act 1481, c. 83, proceeded, and which is entered in the Rolls of Parliament as fixing the law on the point. But the short note which has been preserved of the case seems not to warrant that construction. (*u*) See farther on the point, Wallace, 219—1 Fraser, 435, 6.

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[19] Professor Menzies leans to the view that a judicial ratification by a married woman does not afford an absolute security against challenge; Lectures on Conveyancing, 3d ed., p. 41.

§ 742. The only object of judicial ratification being to exclude coercion by the granter's husband, it does not bar challenge of the deed on any other ground, such as compulsion by a third person, or fraud, or deathbed (*x*). Nor does it bar revocation of a deed as a gift by the wife to her husband; the law allowing donations *inter virum et uxorem* to be recalled, not on the ground of force and fear, but *ne mutuo amore se spolient* (*y*). The ratification, therefore, only protects the interest of third parties under deeds whereby the wife's separate estate, or her conjunct right with her husband, may be impaired.

XVI. *Of Deeds for which Solemnities are required by private arrangement, in addition to those enjoined by public law.*

§ 743. Persons sometimes prescribe for their deeds solemnities additional to those required by common law; and the question then arises, whether these are essential to the constitution of the relative right or obligation. The answer to this question depends on whether the observance of the solemnity in issue is a condition suspensive of the right or obligation—or whether it is merely an additional security designed for the protection of one of the individuals concerned, and which he may insist upon or waive at his pleasure.

§ 744. A striking illustration of the first class of solemnities occurred in a case where a Scotchman, who had returned to his native country after a long residence in India, executed a will, which concluded with the words, "In testimony of this being my last will and testament, I hereto set my hand and seal, and declare it to be written upon three pages, and signed in my own handwriting, this 28th day of September 1803—James Nasmyth." The deed was indorsed, "Will of James Nasmyth, 28th September 1803;" and it bore several markings in pencil containing directions as to drawing a new will, and several holograph alterations in pencil and red ink upon the bequests. It had no seal; and a portion of it below the signature, where the seal had probably been affixed, had been cut away. The deed having been found in this state in a lockfast place belonging to the testator, where he kept several private papers, the executor named in it expede confirmation, and began to administer

(*x*) Ersk., 1, 6, 35—1 Fraser, 486. (*y*) Ersk., *supra*—1 Fraser, 502—Arnold *v.* Scott, 1673, M., 6091—Gordon *v.* Maxwell, 1678, M., 6144—Borthwick *v.* Scott, 1724, M., 6149. *Contra*, Mack. Inst., 1, 6, 14—Richardson *v.* Michie, 1685, M., 6147—Dirl. and Stew., *voce, inter virum et uxorum.*

the executory estate. The deceased's next of kin thereupon raised an action of reduction of the deed, on the ground that the seal had been cut off by the testator for the purpose of cancellation and revocation, and that such was shown to be his purpose by the pencil alterations and other circumstances. To this it was answered that the deed, being holograph and signed, was complete by the law of Scotland, and that the seal not being necessary, its absence could not infer cancellation. The Court of Session adopted the latter view; but their decision was reversed in the House of Lords, chiefly on the ground, that as the testator had prescribed a certain solemnity for the authentication of his will, his removal of that mark of concluded purpose amounted to cancellation (z).[20]

§ 745. From this decision it follows *a fortiori* that, if the parties to any deed declare that a certain form of authentication shall be necessary to prove their consent, the omission or obliteration of that conventional solemnity is (apart from any question of homologation) fatal to the validity of the writing.

§ 746. Contrasted with such cases, are those in which the deed of copartnery or written regulations of a joint-stock company prescribe a certain form for the transfer of its shares. It has repeatedly been held that these forms are intended for the security of the company, by whom they may be insisted on or waived; and that they are not essential to the constitution of an obligation un-

(z) Nasmyth *v.* Hare, 1821, 1 S. Ap., 65; reversing, 7th June 1817 (not reported). Lord Chancellor Eldon observed—"I apprehend that with respect to a will of personal estate, if there are any formalities observed beyond those which the law requires, the law is, that a man may prescribe to himself the forms which shall or shall not be attendant to his will. In this part of the island, your Lordships very well know, if a man makes a will of personal estate—if I were to begin, 'I, John Lord Eldon, do so and so'—whether there was any signature or not, that would be a very good will. But I apprehend, if I thought proper to conclude that will by saying, 'In testimony thereof to this my will, I do hereby set my hand and seal'—that it would be taken, according to our principles of law, to be a declaration of my intention as a testator that the instrument so authenticated is to be a will, and to be taken to be a will, according to the forms which I myself have prescribed to observe. If, indeed, I were cut off in that moment by sudden disease, before I could annex my seal, or before I could annex my handwriting, the will would do; but if it was my professed intention on the face of the will to have certain forms and ceremonies as attesting my execution of the will, and my intention that the will shall not be perfect till I have observed these forms, then (unless my inability to do it is produced by some such circumstance) I apprehend the will would not be mine; though it would be mine if I had not made any declaration as to such (for my purposes) necessary forms and ceremonies."

[20] Wilsone's Trustees *v.* Stirling and others, 1861, 24 D., p. 175, per Lord Curriehill.

dertaken by any partner to transfer his shares, under a contract of sale or other agreement. Thus where a regulation of the East Lothian Bank declared that shares might be sold, and transfers of shares might be made, in such form and manner as should be laid down by the directors, "but so as such transfer be made and accepted of by the purchaser in presence of two directors signing the deed of acceptance;" and where Weatherly, a partner, executed in favour of Turnbull an absolute transfer of shares, which was written by the accountant of the bank, was executed in presence of the accountant and teller, and was entered in the bank books, but was not signed or accepted by the purchaser in terms of the regulations; and where the affairs of the bank having become involved, and Turnbull having been called on as a partner to make an advance, maintained that the transaction had not been completed; whereupon Weatherly raised action to have him ordained to sign the transfer in terms of the regulations, and the bank sued him for his share of the advance required;—the Court held that the obligation to transfer was complete, and must be implemented by Turnbull. Their Lordships were of opinion that the regulation of the bank could not affect the question as between the parties contracting; but, being intended only for the benefit of the bank, might be dispensed with or not as the bank chose (*a*). Thus also, where the contract of copartnery of the Edinburgh and Leith Glass Company provided that when shares were sold or transferred the transfer should be in a certain prescribed form, which included an acceptance by the new shareholder, and bore the signatures of both parties, and had to be recorded in the company's books; and where Stuart, a partner, granted an absolute assignation of shares to Allan and Son, qualified by a back-bond of security; but which assignation did not contain any acceptance by the assignees, and was not recorded in the company's books; and where Allan and Son intimated the assignation (but not the back-bond) to the company, whereupon their names were immediately entered in the company's "Journal of Transfers," and, after Stuart had become bankrupt, their names were entered in the "Register of Shareholders;" and where they were required by the company to pay certain calls on their shares, but refused to do so on the ground that they were only assignees in security, and that the forms necessary to the validity of the transfer had not been observed;—the Court held them liable as partners, on

(*a*) Weatherly *v.* Turnbull, 1824, 3 S., 92, and East Lothian Bank *v.* Turnbull, 1824, ib., 95. But see Lord Denman's remarks on these cases in 7 W. S., 304.

the ground that the formalities in question were intended only for the benefit of the company, and, if waived by them, could not be insisted on by any other person. And this judgment was affirmed on appeal (*b*). A similar decision was again pronounced both in the Court of Session and House of Lords in a late case, where the deed of copartnership declared that a sale or conveyance of stock "shall in no case be valid towards making the purchaser or assignee a partner, unless he shall be approved of by the directors, and a minute to that effect entered in the Sederunt Books"; that any deed of sale or transfer shall be entered in the company's books, and that until that has been done the purchaser shall not "be deemed or entitled to exercise any of the rights of a partner." Even this stringent clause, however, was held to be solely for the benefit of the company, and not to be available to a purchaser of shares, endeavouring to escape from his liability as a partner (*c*).

§ 747. The privileges which such clauses in a contract of copartnery confer on the company may be waived either expressly, or by acts inferring homologation of the irregular transfer (*d*). "And if it be once proved that the company did waive them, they cannot be allowed afterwards to recur to them. It thus becomes just a question of evidence, whether the company are proved to have waived their right of objection, and to have homologated the sale and assignation" (*e*); and every such question must depend on the circumstances of the particular case.[21]

(*b*) Turnbull *v.* Allan and Son, 1833, 11 S., 487; affd., 7 W. S., 281.

(*c*) Burnes *v.* Pennell, 1849, 6 Bell's Ap. Ca., 541; affirming 10 D., 689. See also Robertson *v.* Thom, 1848, 11 D., 353—National Exchange Co. *v.* Easton, 1851, 14 D., 96—M'Andrew *v.* Robertson, 1828, 6 S., 950—Thomson *v.* Fullerton, 1842, 5 D., 379.

(*d*) Fife Bank *v.* Thomson's Tr., 1834, 12 S., 620. (*e*) Per L. President in Fife Bank *v.* Thomson's Tr., *supra*.

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[21] In a recent case the Court had occasion to consider the effect of the exceptional statutory modes of authentication of the registers of public companies under the Companies Clauses Act. The action was by a railway company for calls, and at the jury trial which ensued the pursuers tendered a book as their register, to prove that the defenders held the shares. The question of its admissibility was reserved for the Court. The Companies Clauses Act, 8 and 9 Vict., c. 17, provides (§ 29) that the production of the register of shareholders shall be *prima facie* evidence that any party entered in it is a shareholder, and of the amount and number of his shares; and the 9th section of the act provides how the register is to be kept; the names of the shareholders, the number of their shares, and the amount of the subscriptions paid on them, are to be entered in the book; and it is provided that "the book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time

CHAPTER. II.—OF WRITINGS WHICH DO NOT REQUIRE THE STATUTORY SOLEMNITIES.

The statutory rules considered in the previous chapter are subject to several exceptions; almost all of which have sprung from the exigencies of business or from considerations of equity, in opposition to the unqualified terms of the statutes.

I. *Deeds not "of great importance."*

§ 748. The act 1579, c. 80, requires parties who cannot write to use two notaries and four witnesses in writs importing heritable title and "other obligations of great importance;" but leaves deeds which do not come within these terms to be authenticated by one notary and two witnesses, as required by the act 1540, c. 117. There is not any similar distinction in the acts 1593, c. 179, and 1681, c. 5. But Mr Erskine considers that the latter act, which made the omission of the proper solemnities a ground of nullity,

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at each ordinary meeting of the company." The Court were clear that the book, being the pursuers' book, could not, at common law, be evidence in their favour; that the requirements of the statute were imperative; and, therefore, that the book could receive no effect, unless it was the register of the company, kept and authenticated in terms of the act,—and they held that it was not so, the deviation from the requirements of the statute on which they went being, that the book was made up on the plan of not entering the amount of the subscriptions paid on the calls. But the Court expressed their views at length as to the authentication by sealing required by the act. It appeared that before each ordinary meeting the fly-leaf of the book was sealed with the company's seal, and at each ordinary meeting the meeting held the book as sealed. But no other part of the book was sealed, so that the seals had no apparent connection with the entries. The Lord President (M'Neill) thought that what the act required was the authentication of the book as the current register, and that the mode of sealing adopted might be held sufficient compliance with the act. But Lord Ivory, distinguishing between authentification and identification, thought that the act required some authentication of the entries; that the mode of sealing adopted certified nothing whatever, and that, therefore, the book was not authenticated in terms of the act; Caledonian and Dumbartonshire Junction Railway Co. *v.* Lockhart, 1855, 17 D., 917.

The stamp on a lease for less than a year of a furnished dwelling-house may be adhesive; and across the stamp must be written or stamped in ink the name or initials of the parties to the instrument, and also the date of the instrument, "and proof of the said writing upon or across the stamp as aforesaid, shall be a necessary part of the evidence of the signing or making of the instrument in any case where such instrument is not stamped with an impressed stamp." Provided where the parties to the instrument are more than two, it shall be sufficient if one person only on each part shall write his name or initials on the stamp; 24 and 25 Vict., c. 21, § 14; and 24 and 25 Vict., c. 91, § 83. See a similar provision as to "agreements under hand," 23 and 24 Vict., c. 111, § 12.

must by the just rules of interpretation be limited to writings of importance, to which alone the solemnities had been in use to be adhibited (*a*). This is also the opinion of Sir George Mackenzie (*b*) and Mr Ross (*c*); and it is supported by the rules which admit parole on many matters within £100 Scots, requiring proof by writ or oath of party when beyond that sum (*d*).

§ 749. The only writings coming under this exception are those which relate to moveables within £100 Scots (£8 : 6 : 8 sterling) in value (*e*); and the strict statutory rules apply to deeds regarding subjects beyond that amount, and to all obligations regarding heritage, however small be the sum at stake (*f*). The amount is estimated with regard to the obligant (*g*), and without including the penalty for non-implement (*h*).

§ 750. If the obligation, being for more than £100 Scots, is divisible (*e.g.*, a bond for borrowed money), it is good for that sum, on the creditor so restricting his claim (*i*). If it is indivisible (*e.g.*, an obligation *ad factum praestandum*), specific performance of it cannot be enforced (*k*); but damages for non-implement may be recovered to the extent of £100 Scots (*l*). An obligation which is granted in corroboration or fulfilment of a previous one, but which does not lay any new burden on the granter, has been deemed not to be one "of importance," although it exceeds in amount the sum referred to (*m*).[1]

(*a*) Ersk., 3, 2, 13, and 3, 2, 10. The rubric of Crichton *v.* Syme, 1772, M., 17,047, states that the act 1681, c. 5, was held to apply to all deeds although not of importance. But the point could not have arisen, as the obligation there was for £10 sterling. See Heriot *v.* Blyth, 1681, M., 17,020. (*b*) Mack. Obs. on Act 1579, c. 80 (vol. i, p. 281), Obs. 3. (*c*) 1 Ross Lec., 156. (*d*) *Supra*, §§ 592, 3, 5; 611; 629.

(*e*) Ersk., 3, 2, 10—Ross, *supra*—Tait Ev., 78—Duff Feud. Con., 10.

(*f*) 1579, c. 80—A B, 1725, M., 16,842; *contra*, Ross *v.* Home, 1630, M., 16,831.

(*g*) Ersk., *supra*—Anderson *v.* Tarbat, 1668, M., 16,836. (*h*) L. Halkerton *v.* Kadie, 1628, M., 16,831. (*i*) Ersk., 3, 2, 10—Cases in M., 6840, 1, 2, 3, 4—*Supra*, §§ 593, 629; *contra*, Jack *v.* Jack, 1672, 2 B. Sup., 665. (*k*) Ferguson *v.* Macpherson, 1758, M., 16,848—Ersk., *supra*. As to whether an assignation is indivisible, see Couts *v.* Straiton, 1681, M., 6842; *contra*, Sclanders *v.* Hill, 1710, M., 6844.

(*l*) Ferguson *v.* Macpherson, *supra*. (*m*) Ersk., *supra*—Bell on Testing Clause, 230—Sutor *v.* Crammond, 1635, M., 3098—Jack *v.* Jack, 1671, M., 12,975; 16,836. But Fountainhall reports a later decision in this case to the opposite effect (2 B. Sup., 665); which he challenges on the ground that it held the deed (a bond of provision) altogether null, and refused to sustain it to the extent of £100 Scots.

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[1] Where a notary's docquet bore that two notaries had signed a trust-disposition and settlement at the desire of the granter, and it was held that one of the notaries was disqualified as being a trustee under the deed, it was argued that the deed might be sustained as a conveyance of moveables, though held as signed by one notary only. But

II. *Of Holograph Writings.*

§ 751. Lord Stair justly observes that "holograph writs subscribed are unquestionably the strongest probation by writ, and least imitable" (*n*); because it is much more difficult to counterfeit a person's handwriting throughout a deed, than to forge the several signatures to one not alleged to be holograph. Both writing and subscribing a document, also, is a much more trustworthy expression of intention than merely subscribing a deed written by another. Accordingly holograph deeds are valid, although they do not mention the writer or bear witnesses designed or subscribing (*o*).

§ 752. This privilege extends not only to deeds altogether holograph, but also to those of which only the substantial parts are so (*p*). And, on the other hand, where certain parts of the deed are holograph, but the substantials are not, the statutory solemnities are required (*r*).[2]

§ 753. Of course where a deed by several parties is written by one of them, and signed by them all, it is not holograph, and it will therefore not be sustained even against the party who wrote it (*s*), unless its validity as against the others is not essential to the constitution of the obligations upon him (*t*). But any number of parties may effectually bind themselves under a deed written by

(*n*) Stair, 4, 42, 6. See also Ersk., 3, 2, 22—1 Bell's Com., 324.

(*o*) Authorities in following notes. It is therefore not a relevant objection to a holograph deed that the subscribing witnesses did not see the granter sign, or hear him acknowledge his subscription; Yeats *v.* Yeats' Tr., 1832, 11 S., 915.

(*p*) Stair, *supra*—Ersk., *supra*. So held as to a bond holograph only in the debtor's name, and the sum and date; Vans *v.* Malloch, 1675; M., 16,885;—and as to a testament holograph only in the sums bequeathed and the legatee's names; case of Hartree's testament, noted in Vans *v.* Malloch. See also Allardice *v.* Forbes, 1710, M., 16,862—Panton *v.* Gillies, 1824, 2 S., 632. (*r*) See Heriot *v.* Blyth, 1681, M., 17,020.

(*s*) Sproul *v.* Wilson, 1809, Hume D., 920—Miller *v.* Farquharson, 1835, 13 S., 889.

(*t*) With the cases in the preceding note (which related to contracts), compare M'Millan *v.* M'Millan, 1850, 13 D., 187, where a joint testament, signed by husband and wife, holograph of the former, was sustained as his deed; although, if the wife had predeceased, it would not have been valid as against her next of kin. The absence of subscription by some of the parties in contracts may be obviated by *rei interventus* and homologation. See the chapters on these matters, *infra*.

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it was held that the deed was of importance and required two notaries; and that, even if it had not been so, seeing that, as appeared from the docquet, the granter had entrusted the making of his deed to two notaries, and not to one, the deed would still have been null; Ferrie *v.* Ferrie's Trustees, 1863, 1 Macph., 291.

[2] Laurie *v.* Laurie, 1859, 21 D., 240—*Supra*, § 709, note [12].

another person, by each writing on it with his own hand the words "I agree to the above," or the like, and adding his subscription (*u*). And a deed not holograph may be made effectual by being referred to as valid in a writing proved to be holograph (*x*). A guarantee by a mercantile company, holograph of the acting partner, and signed by him with the firm's subscription, was held valid, although it was not *in re mercatoria* (*y*).

§ 754. A holograph deed not containing a statement that it is so, is not probative; because its validity is a latent fact, which must be proved by the party founding on it. But if it sets forth its holograph character, it is received as probative (or *prima facie* proof) of that fact; which the challenger must bear the burden of disproving (*z*). It is true that much reliance should not be placed upon such a statement; which would probably be introduced into a fabricated writing. But the rule is convenient in fixing the burden of proof, and in giving probative effect to deeds truly holograph. In one case where a deed not bearing *in gremio* to be holograph, was challenged as forged, Lord Jeffrey observed that the party founding on the deed would discharge the burden of proof by *prima facie* evidence that the signature and the body of the writ were in the same handwriting; upon which it would lie on the challenger to prove forgery, on account of the presumption against crime (*a*). But in referring to that opinion in a subsequent case (*b*), Lord President Boyle observed, that the user of a deed not bearing *ex facie* to be holograph, must prove that it is so.[3]

(*u*) Bryson *v.* Crawford, 1833, 12 S., 39. (*x*) As in M'Intyre *v.* M'Farlane, 1st March 1821, F. C.—Inglis *v.* Harper, 1831, 5 W. S., 785; reversing 6 S., 864—See also Hamilton *v.* Moir, 1710, M., 17,028; and *infra*, § 807. (*y*) Buchanan *v.* Denniston, 1831, 9 S., 557; S. C., 13 S., 841. (*z*) Erak., 3, 2, 22—1 Bell's Com., 324—E. Rothes *v.* Leslie, 1635, M., 12,605—Turnbull *v.* Doods, 1844, 6 D., 896, per L. Jeffrey—Robertson *v.* Ogilvie's Tr., 1844, 7 D., 236—Waddell *v* Waddell's Tr., 1845, 7 D., 607, per L. Moncrieff—See also Donaldson *v.* Walker, 1711, M., 11,511, and 12,615—*Contra*, Ellies *v.* Elliot, 1630, 1 B. Sup., 312—Inglis *v.* M'Cubine, 1631, M., 16,962—A B, 1638, 1 B. Sup., 103. (*a*) Turnbull *v.* Doods, 1844, 6 D., 896.

(*b*) Anderson *v.* Anderson, 1850, 22 Sc. Jur., 478.

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[3] The general rule of law is, that a party who founds on a deed as holograph must prove that it is so. Thus where a party produced a document in the form of a letter, bearing to be addressed to him and to be signed by a party deceased, and which bore to be a bequest of the whole moveable estate of the deceased, and where the document was challenged as a forgery; it was held that the onus of proving, not only that the deed was all in one handwriting, but that it was all in the handwriting of the alleged maker, lay on the party propounding the deed; Anderson *v.* Gill; decided 1850; reported 20 D., 1326; affirmed 1858, 3 Macqueen, 180.

§ 755. A general statement, however, that the deed is holograph, will not embrace words written on erasure, or marginal additions and interlineations; which must therefore be proved to be genuine (*c*). If they are, the deed is effectual in its altered condition, although the words are *in substantialibus* (*d*). But when any question of deathbed or the like arises, in which the dates of such alterations are important, these must be proved; and merely proving when the body of the deed was written will not give them effect as of the same date (*e*). Holograph additions on the margin are valid, although not signed by the party (*f*). It is sometimes a question whether holograph alterations made by a party on his deed (*e.g.*, in pencil or red ink) were intended to be effectual as part of the deed, or were merely memoranda for enabling a conveyancer to draw out a new will in terms of the party's directions; and in such cases it may be doubtful whether the granter intended that his original deed should subsist until the execution of the new one, or that it should be held as cancelled, and as no longer the expression of his will. Every such question must depend on the evidence in the particular case, and no rules can be laid down on the point by way of anticipation (*g*).[4]

§ 756. The proof that a writing is holograph may be either by the direct testimony of persons who saw the party write the deed, or by the indirect evidence of those who are acquainted with his handwriting, or who have compared the deed with writings ad-

(*c*) Robertson *v.* Ogilvie's Tr., 1845, 7 D., 286. (*d*) Robertson *v.* Ogilvie's Tr., *supra*—Grant *v.* Stoddart, 1849, 11 D., 860; affd., 1 Macq., 168—Wilson *v.* Smith, 1803, Hume D., 882—Horsburgh *v.* Horsburgh, 1848, 10 D., 824—See also Kemps *v.* Ferguson, 1802, M., 16,949, and per Lord-Ch. Eldon in Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 74. (*e*) L. Durie *v.* Gibson, 1667, M., 16,927—Johnston *v.* Johnston, 1688, M., 17,063—*Supra*, § 733. (*f*) Horsburgh *v.* Horsburgh, *supra*—Bruce *v.* Stewart, 1666, 2 B. Sup., 427. (*g*) See Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 65, where Lord Chancellor Eldon's speech is highly instructive on this class of cases.

[4] In England, alterations in pencil in a will are presumed to be deliberative, but the presumption may be rebutted; Parkins *v.* Bainbridge, 3 Phil. Eccl. Rep., 821—Francis *v.* Grover, 5 Hare, 39, 46–49—Bateman *v.* Pennington, 3 Moore's Pr. Ca., 223. Much of the law about interlineations and erasures in tested deeds is inapplicable to holograph deeds. There is a great distinction in holograph deeds between what is written and what is obliterated. What is written must have been written on purpose; but the obliterations may have happened through mistake; per Lord Chancellor Chelmsford in Magistrates of Dundee *v.* Morris, 1858, 3 Macq., 134. It is, therefore, competent in such cases to read a word obliterated as part of the deed, if the word is necessary to the sense; Chapman *v.* M'Bean, 1860, 22 D., 745.

mitted or proved to be genuine. On this subject, which is fully considered afterwards (*h*), it is only necessary to observe here, that the first kind of evidence is undoubtedly the best. The second is trustworthy, provided the witnesses are persons of observation, and have had sufficient opportunities of seeing the party's handwriting to make them familiar with it. But little or no weight is due to the last; for there are few trials upon the authenticity of deeds, where "persons of skill" do not speak with equal confidence on opposite sides; and, with very rare exceptions, they readily give evidence for the party who first applies to them (*i*). The Court will inspect the document for themselves when the question is decided by them; and in jury trials the jury will be allowed to make a similar examination (*k*). The circumstances under which the deed was produced, the place where it was found, and other similar matters may also be important in such inquiries (*l*).

§ 757. According to Lord Stair, if holograph deeds "are not subscribed, they are understood to be incomplete acts, from which the party hath resiled: yet, if they be written in count books, or upon authentic writs, they are probative, and resiling is not presumed" (*m*). The general rule both of law and practice, therefore, requires that holograph deeds be subscribed in token of concluded purpose. And the absence of this solemnity, combined with other facts which indicate that the deed is inchoate, will be fatal; as in a case of a holograph will which was found, not in the maker's charter-chest, but in his portable writing-desk, and which commenced with his name, but contained several blanks, and was not subscribed (*n*).

By the words of the act 1696, c. 25, subscription by the alleged trustee is required to a declaration or back-bond of trust (*o*).

§ 758. On the other hand, a holograph writing unsubscribed will be sustained if there is no doubt that it was meant to be effectual. This has been held as to the postscript to a holograph and signed letter (*p*); and as to markings by a debtor in an account-

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(*h*) Chapter on the improbation of writings, Part ii, b. i, t. 1, c. 8. (*i*) This remark has been frequently made from the bench, as per L. President Boyle in Turnbull *v.* Doods, 1844, 6 D., 901—Anderson *v.* Anderson, 1850, 22 Sc. Jur., 478—Per L. Balgray in Greig *v.* Clark, 1829, 7 S., 773. (*k*) See chapter on improbation of writings, Part ii, b. i, t. 1, c. 8. (*l*) Anderson *v.* Anderson, *supra*—See Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 65. (*m*) Stair, 4, 42, 6. See also Ersk., 3, 2, 22. (*n*) Dunlop *v.* Dunlop, 1839, 1 D., 912. (*o*) See Watson *v.* Forester, 1708, M., 12,755. (*p*) Wauchope *v.* Niddrie, 1662, M., 16,965—A B, 1671, 2 B. Sup., 517. See also Paterson *v.* Inglis, 1717, M., 9441.

book kept by the creditor (*r*); and receipts for partial payments indorsed on a bond (*s*). So a holograph docquet by a notary signing for a person who cannot write is effectual although not subscribed, if it contains the notary's name *in gremio* (*t*). On the same principle, a holograph, but unsubscribed, account, which the factor for a landlord delivered to one of the tenants, was held to prove a settlement between them, chiefly on account of the delivery (*u*). And a memorandum holograph, but not subscribed, being found in the creditor's repositories, is sufficient as the debtor's writ in cases falling under the triennial or sexennial prescriptions (*x*). In one case, a deed of settlement declared that all legacies should be effectual which the testator should bequeath by separate writings or memoranda, although not formally executed, provided they expressed his intention, and were "written, dated, and signed" by him. He left two holograph documents bequeathing legacies. In the one (consisting of one sheet of paper), the first page was dated and not subscribed, and the second, dated nine days after, was subscribed. The other was unsubscribed, but was marked on the back "Additional Codicil," and began thus—"Additional Codicil, 83 Prince's Street, 1st May 1830.—I, J. D., leave the following additional legacies to my former legacies." The Court sustained them both as valid codicils, Lord Balgray observing, that signing and subscribing are not identical, as the Sovereign signs by superscription (*y*). There is also an old case, in which an unsubscribed holograph will was sustained; but the report does not state whether it bore the testator's name in the body (*z*). The authority of that case, however, was disregarded in Dunlop *v.* Dunlop (*a*), in which the Court considered it more difficult to sustain an unsigned testament than an unsigned contract, discharge, or the like, in which there is onerosity or delivery. In England, holograph wills containing the testator's name in the body, but unsubscribed, were good at common law (*b*). But a recent statute made subscription essential to wills in that country (*c*).[5]

(*r*) Stair, 4, 42, 6. (*s*) Currence *v.* Hacket, 1688, 2 B. Sup., 121—Stair, *supra*. (*t*) Cullen *v.* Thomsons, 1731, M., 16,842—Gordon *v.* Murray, 1765, M., 16,818. (*u*) Ainslie *v.* Chisholm, 1696, M., 12,626. (*x*) Donaldson *v.* Murray, 1766, M., 11,110—Watson *v.* Hunter, 1841, 3 D., 583—Watson *v.* Johnstone, 1846, 18 Sc. Jurist, 598. (*y*) Gillespie *v.* Donaldson's Tr., 1831, 10 S., 174. This decision is doubted by L. Mackenzie in Dunlop *v.* Dunlop, *supra*, 1 D., 912.

(*z*) —— *v.* Tithill, 1610, M., 16,959. (*a*) *Supra*, (*n*).

(*b*) Lemaine *v.* Stanley, 1681, 3 Levinz, 1—Morrison *v.* Turnour, 1811, 18 Vesey, 183—Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 72, per Lord-Ch. Eldon.

(*c*) 7 Will. IV, and 1 Vict., c. 26. § 9.

[5] Lady Baird Preston conveyed her estates to trustees by a formal trust-disposition

§ 759. It would seem that a holograph promissory note in these terms—"I, John Brown, promise to pay," but without the granter's signature, is obligatory (*d*).

§ 760. Holograph deeds not regularly attested are not probative of the dates set forth in them; for, if they were, the rights of competing creditors or disponees, and of heirs in questions of deathbed, and the like, would often and easily be defeated by false dating (*e*).

§ 761. In general the deed is objected to as being antedated;

(*d*) Per Lord Balgray in Gillespie *v.* Donaldson, 1831, 10 S., 174. See also the cases A B (M'Raith *v.* Murdoch), 1788, M., 1436; Elch., "Bill," No. 19, S. C.—Cameron *v.* Cameron, 1775, 5 B. Sup., 393—A B, 1750, M., 1442—A B, 1758, 5 B. Sup., 867—Hare *v.* Geddes, 1786, M., 1446—M'Bean *v.* M'Pherson, 1806, Hume D., 57; in all of which cases bills bearing the drawer's name in the body, but not signed by him, were sustained against the acceptors, at a time when the drawer's subscription was essential to the constitution of the obligation in a bill. But see per L. Fullerton in Dunlop *v.* Dunlop (*supra*), 1839, 1 D., 912.

(*e*) Ersk., 3, 2, 22. Thus a holograph I O U does not prove its date to have been before the granter's bankruptcy; Dyce *v.* Paterson, 1847, 9 D., 1141. A holograph discharge does not prove its date against a singular successor to the debt, whether it is *inter conjunctos*, L. Forbes *v.* M. Huntly, 1611, M., 12,603—or not, Dickie *v.* Montgomerie, 1662, M., 12,606—Bruce *v.* Buchan, 1684, M., 12,609. The same rule applies to a holograph bond in a competition of creditors; Bell *v.* Fleming, 1672, M., 12,607; 2 B. Sup., 158, S. C.—or with an inhibitor; Braidy *v.* Fairney, 1665, M., 12,607; 12,275. A holograph bond by a woman, dated before marriage, is not probative of its date as against her husband; Temple *v.* L. Whittingham, 1636, M., 12,490 and 12,606. A letter signed by a partner with the firm's signature does not prove its date, when founded on after the company is dissolved; Winton *v.* Gibson, 1831, 9 S. and D., 662. In cases of deathbed, holograph deeds do not prove their dates; Yeats *v.* Yeats' Tr., 1833, 11 S., 915; Maitland *v.* Maitland, 16th May 1815, F. C.—Cases in Mor., pages 11,477; 12,607, 9, 12, 14. And the same rule applies to a holograph will challenged on the ground of facility or insanity; Suttie *v.* Ross, 1838, 16 S., 429—Waddell *v.* Waddell's Trustees, 1845, 7 D., 605. On the same ground, the date of a holograph marginal addition is not held to be that of the rest of the deed, and must be proved; L. Durie *v.* Gibson, 1667, M., 16,927—Johnstone *v.* Johnstone, 1688, M., 17,063.

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and settlement, and directed her trustees to pay all legacies she might leave by any separate writing, letter, or jotting under her hand, found in her possession at her death. Eight holograph writings were found in a box, along with the trust-disposition and settlement. One of them was unsigned, but the initials of the testatrix were affixed to a memorandum on the back of it; the others were fully signed, and the testatrix was not in the custom of signing by initials. It was held that the whole of the documents formed part of the settlement. There was considerable difference of opinion on the bench as to the validity of the unsigned document; Baird *v.* Jaap, 1856, 18 D., 1246. Entries in a bank pass-book, holograph of a bank, initialed by an officer of the bank, were held probative; Rhind *v.* Commercial Bank of Scotland, 1857, 19 D., 519; reversed on the ground that a bank pass-book was a current and not a fitted account, and that the entries in it might be challenged; 1860, 3 Macq., 643—32 Sc. Jur., 283.

but the same principle holds where it is alleged to be the reverse (*f*).

§ 762. Stair (*g*) and Erskine (*h*) lay down that holograph deeds not tested are presumed to have been granted on deathbed. But it is evident that these high authorities had in view the question, who must bear the burden of proving the date of such a deed; and that they did not mean to lay down that an untested holograph deed is more probably false than true in its date, or was more probably granted on deathbed than *in liege poustie*. Accordingly, it is thought that the rule should be stated thus:—A holograph deed untested is not probative of its date, which must therefore be corroborated by other evidence, according to the nature of the case; and the party founding on the deed must bear the burden of proof, because he is *in petitorio* and maintains the affirmative (*i*). The corroborating evidence ought to be strong in cases of deathbed, since the granter, being in full possession of his faculties, might be supposed to have antedated his deed in order to defeat the legal presumption against deathbed deeds:—whereas, if the deed is challenged on the ground of facility or insanity, slight corroborating circumstances should be held sufficient to make it effectual as of the date which it bears; because the probabilities are very strong against the supposition that the granter, when incapable of making a rational deed, wrote one with his own hand, and purposely affixed to it a false date, prior to the commencement of his alleged insanity or facility (*k*). In questions of fraudulent preference and alienation, again, the corroborating evidence would require to be strong, since there was a manifest object to gain by antedating the deed.

§ 763. In such cases the date affixed to the deed is not to be regarded *pro non scripto*. Although it is not full proof, it is an element in the proof, to which the jury ought to give such weight as

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(*f*) Row *v.* Dick, 1693, M., 16,699. See also Ayton *v.* Napier, 1686, M., 12,609. In such cases the deed may be set up by the granter's survivance, as where the objection is that it was granted during pupilarity; Ayton *v.* Napier. (*g*) Stair, 3, 4, 29, and More's Notes, p. 316. (*h*) Ersk., 3, 8, 96. (*i*) Haddoway *v.* Inglis, 1673, 3 B. Sup., 200—Cunningham *v.* Ramsay, 1677, note to ibid. This point is well brought out in Lord Moncreiff's charge to the jury in Waddell *v.* Waddell's Tr., 1845, 7 D., 605; and by Lord President Hope in Suttie *v.* Ross, 1838, 16 S., 429; Macf. Rep., 139, S. C. (*k*) See this distinction, as well as the whole law regarding the dates of holograph deeds, fully and clearly expounded by Lord Moncreiff in his charge to the jury in Waddell *v.* Waddell's Tr., *supra*. See also Suttie *v.* Ross, *supra*.

it deserves in the circumstances, and looking to the motives which the party may have had for misdating (*l*).

§ 764. A holograph deed, challenged on the ground that it is not of the date it bears, will be effectual as to matters which do not depend on its date; and, therefore, where a holograph disposition was partly gratuitous and partly onerous, the Court in reducing it *ex capite lecti* reserved its effect as a security for its alleged onerous cause (*m*).

§ 765. It would seem that only third parties—or in case of deathbed the granter's heir—averring that the deed is falsely dated to their prejudice can impugn the date which the deed contains (*n*); and that both the granter of it (*o*), and the grantee who accepted it (*p*), are barred *personali exceptione* from challenging it on that ground.

§ 766. An exception to the general rule that holograph writings are not probative of their dates exists in regard to a debtor's written acknowledgment of intimation of an assignation. Practice and repeated decisions have established such an acknowledgment to be effectual, unless the competing creditor proves that the date is false (*r*).

III. *Of Testamentary Deeds.*

§ 767. Last wills often require to be executed in emergencies by persons disabled from writing, when two notaries and four witnesses cannot easily be procured, and when the presence of so many persons in the sick chamber might be injurious to the testator. On this ground testamentary deeds are probative, if authenticated only by one notary and two witnesses (*s*).

§ 768. Before the Reformation they used to be signed by clergymen acting as notaries; and the act 1584, c. 133, which forbids the

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(*l*) This seems to be the proper construction of Ersk., 3, 2, 22; and the law is so laid down by Lord Moncreiff in Waddell *v.* Waddell's Tr., *supra.* (*m*) Gordon *v.* Ross, 1702, M., 12,614; 5050, S. C. (*n*) Tait Ev., 106—Duff Feud. Con., 27. (*o*) E. Dunfermline *v.* E. Callender, 1674, 1 B. Sup., 703.

(*p*) Scott *v.* Douglas, 1737, M., 12,616; Elch., "Prescription," No. 12, S. C.

(*r*) 2 Bell's Com., 18—Bell's Pr., § 1465—More, 281—Tait Ev., 54—M'Gill *v.* Hutchison, 1630, M., 860; 12,605; S. C.—Gray *v.* E. Selkirk, 1708, M., 4453; 1 Rob. Ap. Ca., 1; S. C.—Newton *v.* Collogan, 1785, M., 850—Dougal *v.* Gordon, 1795, M., 851.

(*s*) Stair, 3, 8, 84—Ersk., 3, 2, 23—Tait Ev., 109—Buchanan *v.* M'Artey, M., 16,958—Bog *v.* Hepburn, 1623, M., 16,960—Stoddart *v.* Arkley, 1799, M., 16,857—Hardie *v.* Hardie, 6th December 1810, F. C.—Rintoul *v.* Boyter, 1833, 5 De. and And., 215, affd., 6 W. S., 394.

clergy to exercise lay offices, excepts the "making of testaments." This privilege originally applied only to churchmen who had been entered as notaries; but long custom has extended it to all parish clergymen of the established church, because their office frequently brings them to dying persons when notaries cannot be got. Accordingly, a will signed for the testator by his parish clergyman before two witnesses is valid and probative (*t*). In two old cases, wills were reduced because signed by the minister of a different parish from that in which the testator resided, and in which the parish minister was present at the time (*u*). It would therefore seem that the privilege does not extend to clergymen of dissenting churches.

§ 769. The question whether a particular deed is privileged as a will, depends on whether it is of a testamentary nature, and not on the circumstances attending its execution. Thus an assignation executed by one notary for a person on deathbed is null (*x*); whereas a postnuptial marriage-contract so authenticated has been sustained, as being in fact a mutual will (*y*). The privilege does not extend to *mortis causa* dispositions of heritage, which in form are deeds *inter vivos* (*z*). But a nomination of tutors signed by clergymen in place of notaries has been sustained (*a*).

§ 770. Wills are privileged only in the form, not in the substance, of the execution. Accordingly, the docquet must bear that the subscription, whether by a notary or a clergyman, was by the testator's authority (*b*). In one case where a will bore at the foot the testator's name, and the docquet stated that she had put the pen into the minister's hand "earnestly requesting" him to sign her name for her, the Court held the deed to be invalid in that form, but sustained it on the minister signing his own name, the case having been superseded for that purpose (*c*). This decision is said to be of doubtful authority (*d*). In another questionable case, a legacy above £100 Scots was held to be constituted by a certificate signed by a minister in his own name, although the testator had previously executed a will which did not mention the be-

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(*t*) Stair, 3, 8, 34, and 4, 42, 7—Ersk., 3, 2, 23—1 Ross Lec., 159—Tait Ev., 109—Cases in following notes. (*u*) Hepburn *v.* L. Waughton, 1606, M., 16,827—Douglas *v.* Wilson, there cited. (*x*) Wardlaw *v.* E. Marischal, 1610, M., 16,959.

(*y*) Stoddart *v.* Arkley, 1799, M., 16,857. See also L. Hassington *v.* Bartilmo, 1631, M., 16,832, noted *supra*, § 675. (*z*) More, 404—Stoddart *v.* Arkley, *supra*.

(*a*) Gray *v.* L. Ballegerno, 1678, M., 16,296. (*b*) Mackenzie *v.* Burnett, 1688, M., 16,838—Williamson *v.* Urquhart, 1688, M., 16,838. (*c*) Traill *v.* Traill, 1805, M., 15,955; 17,061, S. C. (*d*) More's Notes, 405—Tait, 110.

quest (*e*). A nomination of tutors was once sustained, although the ministers acting as notaries signed it after the testator's death (*f*). This decision cannot be relied on (*g*).

§ 771. Erskine (*h*) says that "testamentary deeds are so much favoured, that if the testator's intention appear sufficiently, they are sustained, although not quite formal, especially if they be executed where men of skill in business cannot be had." And he cites a case in which a will executed by a soldier when abroad, which did not mention the writer, was sustained, apparently on the principle of the *testamentum militare* of the civil law (*i*). In another case the Court, "in the particular circumstances" (which were very special), held that a *legatum liberationis* of two debts of 10,000 merks each, was validly bequeathed under certain informal writs, which they allowed to be adminiculated by parole evidence (*k*). But in modern cases the Court have repeatedly refused to give effect to testaments and codicils which were not holograph, probative by the act 1681, or executed by a notary, or minister, and two witnesses (*l*).

§ 772. A mutual will by a husband and wife, written and signed by the former, and signed by the latter, was sustained as the husband's will; although it would not have been effectual as the wife's if she had predeceased (*m*).[6] A mutual will is thus different from a contract, which is null as to all the obligants, if any of them are not bound by it.

§ 773. It is essential to wills, whatever be the form of their authentication, that they be executed as finished writs. Accordingly, where a testator in a holograph letter directed his agent to prepare a codicil in certain terms, which he annexed in his own

(*e*) Dundas *v.* his father's Exr., 1639, M., 12,501. (*f*) Gray *v.* L. Ballegerno, *supra*. (*g*) See Huggane *v.* Scott, 1664, 2 B. Sup., 862; where the Court seemed to think it would be a good ground for reducing a will, that the clergyman and witnesses signed after the testator's death. (*h*) Ersk., 3, 2, 23—See Norvel *v.* Ramsay, 1763, M., 12,290, noted *infra*, § 780. (*i*) Ker *v.* Hay, 1708, M., 16,968; 2 Fount., 411, S. C.—See also Pennycook *v.* Campbell, 1709, M., 16,970—Montgomery *v.* M. Lothian, 1702, M., 16,976—L. Sempil *v.* Murray, 1732, Rob. Ap. Ca., 282—and *per curiam* in Crichton, 1802, M., 15,952. (*k*) Norvel *v.* Ramsay, 1763, M., 12,290. (*l*) Rankine *v.* Reid, 1849, 11 D., 543—Dundas *v.* Lewis, 1807, Hume D., 917; Mor. Apx., "Writ," No. 6, S. C.—Crichton, 1802, M., 15,952—Logan *v.* Logan, 1823, 2 S., 253—See also M'Millan *v.* M'Millan, 1850, 13 D., 187—Inglis *v.* Harper, 1831, 5 W. S., 785; reversing, 6 S., 864. (*m*) M'Millan *v.* M'Millan, *supra*.

[6] Laurie *v.* Laurie, 1859, 21 D., 240.

handwriting, and signed, laying up a duplicate of it in his repositories; and where he died (not suddenly) before a formal deed had been prepared, but after some correspondence with his agent as to its terms—the House of Lords, reversing the decision below, held the document to be only a contemplated, not a completed, codicil (*n*). In another case a person executed a trust-deed for payment of such annuities, &c., as he should appoint by a writing under his hand, although informal; and he also executed a relative deed of instructions reserving power of alteration. He afterwards sent to his agent holograph and signed instructions for a new settlement, the draft of which was transmitted to him when confined to bed by indisposition; and he was seised one or two days afterwards with an illness of which he died, without having executed a formal deed or initialed the draft. The Court refused to hold the holograph instructions as equivalent to a will (*o*).[7] Thus, also, where a testator signed and sealed a holograph testament concluding "In testimony of this being my last will and testament I hereto set my hand and seal;" and the deed was found in his repositories with the seal cut (not torn) off, there being no suspicion that a stranger had damaged it,—the House of Lords, reversing the decision of the Court of Session, held that the testator had prescribed a solemnity essential to the authentication of his will; and, having himself withdrawn that, had intentionally mutilated and annulled the deed (*p*).

§ 774. A signed but improbative will cannot by *rei interventus* during the testator's life be raised into a conveyance *inter vivos* (*r*). Homologation, however, may exclude the heir-at-law from reducing an informal will (*s*).[8]

IV. *How far Discharges are privileged.*

§ 775. The statutory formalities must be observed in deeds of

(*n*) Monro *v.* Coutts, 1813, 1 Dow, 437. (*o*) Stainton *v.* Stainton's Tr., 1828, 6 S., 363. (*p*) Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 65. There were also alterations in red ink and pencil on the instrument, and extrinsic documentary evidence of the testator's intention to execute a new will. See this case *supra*, § 744.

(*r*) Boyes *v.* Dinwoodies, 1800, Hume D., 910. (*s*) See Fordyce *v.* Fordyce, 1743, M., 5700; Elch., "Testament," No. 9, S. C. See *infra*, § 852, *et seq.*, on homologation.

[7] But where a truster in a *mortis causa* trust-deed directed his trustees to pay his creditors, as they and the amount of their debts should be set forth in a list to be left by the truster; it was held that the bequest was good, and could not be defeated by failure of the truster to leave such a list; Sprot *v.* Pennycook, 1855, 17 D., 840.

[8] As to wills executed abroad, see 24 and 25 Vict., c. 114, and *infra*, § 1024, *et seq.*

discharge (with certain exceptions to be noticed immediately), when the amount is beyond £100 Scots (*t*). This has been held in regard to discharges of a debt of £100 sterling (*u*); of a bond (*x*); and of a legacy (*y*).

§ 776. But receipts for rent are valid if only signed; a privilege said to have been granted to tenants on account of their rusticity and ignorance of business (*z*). The same rule is applied in practice to receipts for feu-duties.

§ 777. Discharges *in re mercatoria* come under the privilege in favour of that class of writings (*a*). Professor Bell considers that the discharge of a debtor on a composition-contract is valid, if subscribed by the creditors without the statutory formalities, on account of the neglect among mercantile men to observe these in their ordinary writings in important business matters (*b*). But, with deference to that high authority, there is room to doubt whether a deed of so important a character, for which no peculiar haste is required by the exigencies of trade, and which is only collaterally allied to *res mercatoriae*, is valid without the rules of the statutes being observed.

§ 778. A receipt by an officer of a regiment for £50 sterling to account of pay, not holograph or tested, was once sustained, probably on account of the practice not to authenticate such documents in terms of the statutes (*c*).

§ 779. There is a great deal of looseness in practice as to the authentication of discharges; and, in particular, receipts for termly payments of interest, annuities, premiums of insurance, and the like, are almost always merely subscribed by the granter without any attestation. It is not likely that the Court would hold such receipts null.

§ 780. In a case of a very special nature the Court sustained a

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(*t*) Cases in three next notes—*Supra*, § 748. The report of the case Campbell *v.* Montgomerie, 1822, 1 S., 446, states that an informal discharge was there sustained. But the session papers show that there were a number of other points which were sufficient for the decision of the case, without raising any such general question.

(*u*) Irvine *v.* Macjore, 1710, M., 12,284. (*x*) Gordon *v.* M'Intosh, 1710, M., 16,974. (*y*) Grierson *v.* King, 1781, M., 17,054; Hailes, 887, S. C.

(*z*) Stair, 4, 42, 6—Ersk., 3, 2, 23—Tait Ev., 125—2 Hunter on Land. and Ten., 428—Schaw *v.* his Tenants, 1667, M., 16,966—Preston *v.* Scott, 1667, M., 16,967—Boyd *v.* Storie, 1674, M., 12,456; 16,968, S. C.—Cunningham, 1684, 2 B. Sup., 66—Glendinning *v.* Glendinning, 1685, M., 9213. (*a*) *Infra*, § 784, *et seq.*

(*b*) 2 Bell's Com., 504. This point was raised but not decided in Glass *v.* M'Intosh, 1825, 4 S., 1. (*c*) L. Sempill *v.* Murray, 1732, Rob. Ap., 282. See also Montgomery *v.* M. Lothian, 1712, M., 16,976—*Supra*, § 770.

legatum liberationis of two bonds of 10,000 merks each, bequeathed by certain informal writings, which were allowed to be adminiculated by parole proof (*d*).

V. *Writings in Submissions.*

§ 781. It has already been shown in what cases writ is essential to deeds of submission and decrees-arbitral (*e*). Wherever writ is required for the decree, the statutory solemnities must be observed (*f*). But there seems no reason for excluding irregular awards as to moveables *inter rusticos* or *in re mercatoria*, where a formal submission is not entered into (*g*).

§ 782. All writings executed by the arbiters in the course of the proceedings are probative without the statutory solemnities; because they are *quasi* judicial acts, and the circumstances in which they are written leave almost no room for forgery. This holds not only in regard to interlocutory orders on the parties, but as to prorogations of the submission (*h*), and devolutions to an oversman (*i*); although without these the arbiters or oversman respectively would not have power to pronounce their decrees.

§ 783. It is usual for arbiters before final decision to issue notes of their intended judgment. But they are not obliged to do so; nor are they bound to pronounce decree in terms of the views which their notes contain. As the notes, therefore, do not express a concluded determination, they are not equivalent to a decree-arbitral; and the issuing of them during the subsistence of the arbitration does not authorise the arbiters to sign a decree in terms of them after the submission has terminated (*j*). *A fortiori*, it is incompetent to modify or control a formal decree-arbitral by referring to the preliminary notes (*k*). But it would seem that they may be used for the purpose of correcting an *error calculi* in the decree (*l*), and of ascertaining whether the arbiters proceeded on grounds

(*d*) Norvel *v.* Ramsay, 1763, M., 12,290. (*e*) See §§ 550, 559.

(*f*) Halyburton *v.* Halyburton, 1708, M., 16,970—Short *v.* Habkin, 1711, M., 16,867 (altering an earlier judgment in same case, M., 17,029; 4 B. Sup., 832)—Percy *v.* Meikle, 25th November 1808, F. C.—Lang *v.* Brown, 1852, 15 D., 88.

(*g*) See §§ 559, 784, *et seq.* (*h*) Stewart *v.* Wathertone, 1804, M., 16,911—Kirkaldy *v.* Dalgairn's Tr., 16th June 1809, F. C.—Gordon *v.* Monteith, 10th December 1812 (where the objection that untested prorogations were not probative of their dates, was repelled), A B (no date), M., 17,010; *contra*, Sutherland, 1744, M., 652.

(*i*) Stewart *v.* Wathertone, *supra*—Kirkaldy *v.* Dalgairn's Tr., *supra*—*Contra*, Heriot *v.* Wight, 1780, M., 661, 16,906; Hailes, 849, S. C. (*j*) Lang *v.* Brown, *supra*.

(*k*) *Supra*, § 159. (*l*) Morrison *v.* Robertson, 1825, 1 W. S., 143.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] the decree of a judicial referee is good, [illegible] by the referee. So the opinion of [illegible] as a decree-arbitral, if signed [illegible] In a late case [illegible] pronounced in England by [illegible] and was not authenticated [illegible] that, although it was [illegible] a holograph or tested instrument, [illegible] by express or tacit consent, as in the [illegible] and that such consent was [illegible] that the arbiter was [illegible] with the solemnities of Scotch deeds. But the majority of the Court were of opinion that if the deed would not be held valid in England it could not receive effect in Scotland; but that if valid by the law of England its validity would be recognised in the Scotch Courts, because it was enough that the deed was valid *secundum legem loci executionis*; E. of Hopetoun v. Scots Mines Co., 1856, 18 D., 739

§ 758. Professor Bell lays down that one of the privileges of mercantile writings is, that although not signed by witnesses they prove their dates (*t*). This is correct as to bills and notes; but with regard to other writings *in re mercatoria* it seems to hold only where the question relates to the ordinary mercantile purposes for which such documents are granted. If the writing is alleged to have been executed on deathbed in order to defeat the granter's heir,—or on the eve of bankruptcy in order to create a fraudulent preference,—or to have been executed during minority, but dated after the party came of age—it seems not to be probative of its date; which must therefore be adminiculated by the party founding on it (*u*).

§ 786. The documents privileged as *in re mercatoria* are thus enumerated by Professor Bell (*x*), "bills, notes, and checks upon bankers, orders for goods, mandates and procurations, guarantees (*y*), offers and acceptances to sell or buy wares and merchandise, or to transport them from place to place; and in general all the variety of engagements, or mandates, or acknowledgments, which the infinite occasions of trade may require." As it is thus writings really connected with trade, and not all writings executed by merchants, which are privileged, there is considerable difficulty in determining whether some writings which are collaterally connected with mercantile transactions are included. Of this nature are composition-contracts (*z*), and guarantees for repayment of advances by a bank (*a*); as to both of which writings there is considerable doubt whether they are effectual without the statutory solemnities.[10]

Shiell, 1729, M., 16,810—Thomson *v.* Crichton, 1676, M., 16,968; and as to authentication by a mark, Ker *v.* Riddell, 1803, Hume D., 50—Craigie *v.* Scobie, 1832, 10 S., 510—Brown *v.* Johnstone, 1662, M., 16,802—Kennedy *v.* Watson, 25th May 1816, F. C. —See Stewart *v.* Russell, 11th July 1815, F. C. (*t*) Bell's Com., *supra.*

(*u*) Skene *v.* Lumsden, 1662, M., 12,618—Row *v.* Dick, 1693, M., 16,699—Rutherfurd *v.* Hay, 1739, Elch., "Writ," No. 7—Winton *v.* Gibson, 1831, 9 S., 662—Dyce *v.* Paterson, 1847, 9 D., 1141—Compared with Currier *v.* Halliburton, 1683, M., 12,625; and see *infra*, § 806, as to how far bills are probative of their dates.

(*x*) 1 Bell's Com., 325. (*y*) As to guarantees, see *supra*, § 600 (1).

(*z*) See *supra*, § 777. (*a*) See *supra*, § 600 (4).

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[10] All guarantees must be in writing, and must be subscribed by the party granting the guarantee, or by some person duly authorised by him; 19 and 20 Vict., c. 60, § 6. Acknowledgments for cash advances not connected with any mercantile transaction, were held by Lord Mackenzie not to be writings *in re mercatoria;* and as they were not duly tested or holograph, they were held improbative, and ineffectual to constitute obligation, though the subscription to them was admitted; Hamilton's Executors *v.* Struthers, 1858, 21 D., 51. Notes obliging the granter to deliver goods to the bearer

which they were not entitled to entertain (*m*), or whether their decree embraces the whole matters which were submitted to them (*n*),—provided the decree itself is ambiguous on these points.[9]

VI. *Of Writings* in re mercatoria.

§ 784. The expedition required in mercantile transactions, and their general subjection to the *jus gentium*, rather than to the laws of individual states, have excepted writings connected with them from the statutory rules as to authenticating deeds. This is a safe privilege; because this class of writings almost always take effect before the evidence as to their authenticity is likely to be lost or impaired by lapse of time; while most of the matters which they embody may be proved by parole evidence. On these grounds documents *in re mercatoria* are valid, if merely subscribed; and if their authenticity is disputed, it may be proved *prout de jure* (*o*). As already noticed, they may be signed by initials (*p*); and subscription by a cross or mark, with adequate proof of its genuineness, is also competent (*r*). It is proper, but not essential, that the initials or mark be adhibited before subscribing witnesses (*s*).

(*m*) Steele *v.* Steele, 22d June 1809, F. C. (*n*) Bell *v.* Halliday, 1825, 4 S., 286. (*o*) Mack. Obs. on 1579, c. 80 (vol. i, p. 281), Obs. 3—Ersk., 3, 2, 24—1 Bell's Com., 325—More, 405—Tait Ev., 120. (*p*) 1 Bell's Com., 325—*Supra*, § 665. (*r*) 1 Bell's Com., 325—Bryan *v.* Murdoch, 1824, 3 S., 282; affd., 2 W. S., 568—Watson *v.* Hamilton, 1824, 3 Mur., 484—*Supra*, § 667.

(*s*) So held as to initials; Shepherd *v.* Innes, 1785, M., 589; 16,818—Thomson *v.*

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[9] A holograph decree-arbitral is effectual; the decree of a judicial referee is good, though neither holograph nor tested, if it be signed by the referee. So the opinion of counsel, returned on a mutual memorial, is as binding as a decree-arbitral, if signed by the counsel; Fraser *v.* Lovat, 1850, 7 Bell's Appeal Cases, 171. In a late case the whole Court considered the validity of a decree-arbitral, pronounced in England, by an arbiter who was an Englishman; it was not holograph, and was not authenticated according to the law of Scotland. Several of the judges thought that, although it was in general necessary that a decree-arbitral should be a holograph or tested instrument, yet the parties might dispense with authentication by express or tacit consent, as in the case of a judicial reference or mutual memorial to counsel, and that such consent was implied in the case before the Court, chiefly from the circumstance that the arbiter was an Englishman, and presumably unacquainted with the solemnities of Scotch deeds. But the majority of the Court were of opinion that if the deed would not be held valid in England, it could not receive effect in Scotland; but that if valid by the law of England, its validity would be recognised in the Scotch Courts, because it was enough that the deed was valid *secundum legem loci executionis;* E. of Hopetoun *v.* Scots Mines Co., 1856, 18 D., 739.

brought out against a client in his law-agent's account, being subscribed by the former, is proof that he examined and approved of the account (*f*).

§ 789. As this privilege is designed only to cover accounts and relative minutes and docquets in mercantile and other business transactions, it does not apply to an acknowledgment appended to an account of advances of money (*g*), unless made by a banker. Where, however, an account between an uncle and a nephew (both of whom were farmers) consisted partly of furnishings for stocking a farm, and partly of money advances, the Court sustained a docquet appended to it, which was signed, but not holograph or probative, and which acknowledged the debt and promised to pay it (*h*).

§ 790. Accounts which come within the privilege are sustained, if authenticated by initials, or by a cross or mark (*i*). Even unsigned holograph docquets to accounts are valid (*k*). And a memorandum by a debtor, holograph but unsubscribed, found in the creditor's repositories, and mentioning the articles in a prescribed account, was held to prove that the account was resting-owing (*l*). In another case a scroll account, holograph of a landlord's factor, but not signed, was held to prove that the payments which it mentioned had been made by the tenant, to whom it had been delivered by the factor (*m*). But the Court would not sustain an account on some loose sheets of paper, where the merchant in his oath on reference admitted it to be holograph, but added that the debt was not resting-owing (*n*).

§ 791. An account which has evidently been filled in above the debtor's signature will be rejected, unless there be clear proof that it was inserted with his consent (*o*).[11]

(*f*) Mackenzie *v.* Mackenzie's Tr., 1831, 9 S., 730. But the client was held not to be foreclosed from examining the items of the account. He would not have been, even if the docquet had been holograph. (*g*) Laidlaw *v.* Wilson, 1844, 6 D., 530—See also Alexander *v.* Alexander, 1830, 8 S., 602. (*h*) Stephen *v.* Pirie, 1832, 10 S., 279—See E. Northesk, 1671, M., 16,967. (*i*) Watson *v.* Hamilton, 1824, 3 Mur., 484—*Supra*, § 667. (*k*) Stair, 4, 42, 8 (6). (*l*) Donaldson *v.* Murray, 15th Jan. 1766, M., 11,110. (*m*) Ainslie *v.* Chisholm, 1696, M., 12,626. (*n*) Nasmyth *v.* Bower, 1665, M., 12,621. (*o*) Campbell *v.* Grant, 1843, 5 D., 755—*Supra*, § 672.

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[11] M'Laren *v.* Liddell's Trs., 1860, 22 D., 373—Same case, 1862, 24 D., 577.

VIII. *Of Bills and Promissory-Notes.*

§ 792. Being in their origin, and still in their most important use, international documents, and being constantly required in the course of commercial transactions, bills possess all the privileges of writings *in re mercatoria.* The privileges of bills have been extended by statute to promissory-notes (*p*); which will in the following sections be treated under the general term Bills.

§ 793. In daily practice these documents are enforced both by way of action and of summary diligence, if they are signed by the parties without witnesses named or subscribing. Bills authenticated by initials (*r*), or a mark (*s*), are also valid, either with or without subscribing witnesses (*t*); but as their genuineness when so authenticated requires to be proved, they do not warrant summary diligence (*u*).[12]

§ 794. Bills by persons who cannot write should be authenticated by two notaries and four witnesses, designed in the notarial docquet (*x*). And as that mode of authentication is probative in writings which require the statutory solemnities, bills so subscribed are warrants for summary diligence (*y*). Where a bill by a person who cannot write is signed by one notary before two witnesses named and designed in the docquet, it will be sustained in an action (*z*); but it seems not to warrant summary diligence (*a*). If a bill granted by a person who cannot write is signed by one or two notaries without witnesses, it is not probative (*b*); but it will be sustained on proof of authority; because, as already mentioned, a bill to which the granter's name has been written by another person, although not a notary, is binding, provided there be clear proof that the party authorised the subscription, or adopted or homologated the bill (*c*).

§ 795. In England a party is effectually bound by a holograph

(*p*) 12 Geo. III, c. 72, § 36, made perpetual by 28 Geo. III, c. 18, § 55.

(*r*) *Supra*, § 665. (*s*) *Supra*, § 667. (*t*) *Supra*, § 667.

(*u*) *Supra*, § 668. (*x*) *Supra*, § 673, *et seq.* (*y*) Thomson on Bills, 554.

(*z*) Dinwoodie *v.* Johnston, 1737, M., 1419; 5 B. Sup., 888; Elch., "Bill," 16 S. C. See this case noticed in Buchanan *v.* Duncan, 1765, M., 1451; 16,985.

(*a*) Thomson, *supra.* (*b*) Fyfe *v.* Bean, 1762, 5 B. Sup., 887—Buchanan *v.* Duncan, *supra.* (*c*) *Supra*, §§ 568, 671.

[12] No acceptance of a bill, made after 31st December 1856, shall bind any person unless it be in writing on the bill; 19 and 20 Vict., c. 60, § 11. Serjeant Byles holds that a provision to the same effect in the corresponding English act, 19 and 20 Vict., c. 97, would not be held to extend to foreign bills accepted abroad, if, by the law of the place, a written acceptance was not necessary; Byles on Bills, 8th edition, 176.

note containing his name in the body, but unsubscribed (*d*). Such a document seems also to be binding in this country (*e*). But it would not warrant summary diligence; because the fact of holograph, on which its validity depends, requires to be proved.

§ 796. At one time bills signed blank in the creditor's name were held to fall under the act 1696, c. 25, against blank writs. But it has for a long time been settled law that one who signs his name upon a blank bill stamp, authorises the party who holds the "skeleton bill" to fill in above the signature whatever sum the stamp will carry (*f*); and (unless where there is fraud) he cannot object that the party appearing as payee was not the person he intended (*g*), or that he did not get notice of the bill being completed (*h*).

§ 797. A bill may be signed by the drawer at any time before being produced in judgment (*i*); and it is valid, if signed by him after both the acceptor and the payee have died (*k*). And if the drawer in a bill payable to himself, is dead, his heir or confirmed executor may sign it (*l*). But it is not settled whether summary diligence can pass on a bill so completed (*m*).

§ 798. A new holder into whose hands a bill has come, blank in the drawer's signature, may sign it as drawer (*n*); and he may then use summary diligence on it (*o*), as well as plead the presumption of onerosity (*p*). But where a bill, blank in the drawer, was accepted payable to a person named, who handed it blank to one of his creditors (instead of signing as drawer and indorsing it), and the creditor signed it as drawer, it was held not effectual in competition with an arresting creditor of the payee (*r*).

(*d*) Taylor *v.* Dobbins, 1 Strange, 899—Chitty on Bills, 163—Bayley on Bills, 38.

(*e*) *Supra*, § 759. (*f*) See *supra*, §§ 648, 651. (*g*) Thomson, Still, & Co. *v.* Gall, 1805, Hume D., 53—Drummond *v.* Campbell, 1813, ib., 71—Smith *v.* Taylor, 1824, 2 S., 755. (*h*) Lyon *v.* Butter, 1841, 4 D., 178. (*i*) 1 Bell's Com., 396—Ferguson *v.* Blair, 1758, M., 1443, and cases in following notes.

(*k*) Shaw *v.* Farquhar, 1761, M., 1444—Cathcart *v.* Dick's Reps., 1748, M., 1439.

(*l*) 1 Bell's Com., 391—Fair *v.* Cranstoun, 1801, Hume D., 46; M., 1677, S. C.—M'Bean *v.* M'Pherson, 1806, Hume D., 57—Macdonald's Tr. *v.* Rankine, 13th June 1817, F. C.—Over-ruling Robertson *v.* Bisset, 1777, M., 1445; 1676; and M., "Bills," Appx., No. 5, S. C. (*m*) Professor Bell (1 Com., 391) considers that summary diligence is competent; and this view is favoured by M'Bean *v.* M'Pherson, *supra*. But in Fair *v.* Cranstoun, *supra*, Lord Eskgrove inclined to doubt upon the point.

(*n*) Thomson, Still, & Co. *v.* Gall, 1805, Hume D., 53—Disher *v.* Kidd, 1810, ib., 64—Drummond *v.* Campbell, 1813, ib., 71—Smith *v.* Taylor, 1824, 2 S., 755—Grassick *v.* Farquharson, 1846, 8 D., 1073. (*o*) Cases in preceding note.

(*p*) Thomson, Still, & Co. *v.* Gall, *supra*. (*r*) Grant *u.* Cruikshanks, 1769, M., "Bills," Appx., No. 1. But see Thomson on Bills, 57.

§ 799. Action, but not summary execution, will also be sustained on a bill on which no drawer's name appears (*s*). This was held where the payee was a third party named in the bill (*t*); where a bill bearing the drawer's name in the body (but not written by him) was indorsed by him, and bore receipts for payments to account (*u*); where a bill indorsed by the drawer was blank in his name and signature (*x*); and where the drawer's name was set forth in the body, but without subscription or indorsation (*y*). Even where none of these circumstances identify the drawer, the holder of a blank bill is entitled to action upon it, his possession presuming a just title (*z*).

§ 800. A bill accepted blank, however, may be rendered inoperative through fraud of the holder or those with whom he is in concert (*a*). But the Court jealously refuse to extend this exception (*b*).

§ 801. After the drawer's subscription has been adhibited, it cannot be deleted or materially altered, without destroying the bill; and if there are several drawers, deleting the signature of one frees them all, because it changes the relative rights under the original contract. Thus where Kilpatrick and M'Leay were joint drawers, and Watson was acceptor, of a bill for Watson's accommodation, which was also indorsed by the drawers and by Watson's brother; and where Callender at the request of Watson's brother indorsed it, and, supposing that M'Leay had signed as drawer in mistake for indorser, he deleted M'Leay's subscription as drawer and handed the bill to Watson's brother to discount it at a bank; and where Watson having failed, and Callender having retired the bill raised action for the amount against Kilpatrick, M'Leay, and Watson's brother—the Court sustained their defences founded on the deletion, and disregarded Callender's answer, that that had been done in *bona*

(*s*) In M'Donald's Tr. *v.* Rankin, 13th June 1817, F. C., "the question whether action is competent on a bill found in the repositories of a defunct, blank in the drawer's name, was considered by the Court as already quite settled;" and their Lordships would not order answers on the point, "lest it might be conceived that they entertained a doubt upon it."

(*t*) Drummond *v.* Drummond's Crs., 1785, M., 1445.

(*u*) Hare *v.* Geddes, 1786, M., 1446.

(*x*) Ogilvie *v.* Moss, 1804, M., Appx., "Bills," 17—A B, 1758, 5 B. Sup., 867.

(*y*) A B, 1750, M., 1442.

(*z*) M'Donald's Tr. *v.* Rankin, *supra*—Fairlie *v.* Brown, 1824, 3 S., 5—Elder *v.* Marshall, 1830, 9 S., 133.

(*a*) Hood *v.* Darling, 1808, Hume D., 59—*per curiam* in Lyon *v.* Butter, 1841, 4 D., 178—and in Grassick *v.* Farquharson, 1846, 8 D., 1073—Thomson on Bills, 56, 80.

(*b*) Lyon *v.* Butter, *supra*—Grassick *v.* Farquharson, *supra*—Thomson, *supra*—Bayley, 40.

fide and for the purpose of rectifying a supposed error (*c*). Thus, also, where a bank agent, who had discounted a blank bill, filled in his own name as drawer and indorsed the bill to the bank; and where on their re-indorsing it to him to operate payment, he deleted his own name as drawer and got the person who had been originally intended to be drawer to sign as such and as first indorser;—in an action by the bank against the acceptor, the bill was held to be null both at common law and under the Stamp Acts (*d*). But where the holder of a bill blank indorsed for value (being an ignorant person), instead of indorsing it, as he should have done, wrote his name on the face of the bill, so as *ex facie* to be a joint drawer; and where, on the bill being protested, the notary, observing the irregularity, deleted the subscription and filled up the blank indorsation with the holder's name, the Court held that the bill was good even as a warrant for summary diligence, because there was no alteration on the bill as originally constituted, but only a correction of an accidental error which had come upon the bill after it had been put into the circle (*e*).[13]

§ 802. It has been held several times that a party by signing a bill or note, in such a manner that he does not appear as a drawer or indorser, will be liable as one of the obligants (*f*). Thus where a note bearing, "I promise to pay to Don," was subscribed by A. Watt, and bore on the back J. Watt's signature without an indorsation, J. Watt was held a joint obligant in a question with Don (*g*). Thus, also, where a bill accepted by two persons was signed on the back by a third, who was not drawer, payee, or indorsee, the Court held him jointly bound (*h*). And a bill addressed to A and B as

(*c*) Callender *v.* Kilpatrick and others, 10th December 1812, F. C.; Hume D., 70; S. C. (*d*) Fleming *v.* Scott, 1828, 2 S., 446—Young's Tr. *v.* Paisley Bank and Scott (same case), 1831, 9 S., 574; *contra*, Lumsden *v.* Marr, 1806, Hume D., 55.

(*e*) Russel *v.* Mill, 1810, Hume D., 68. See also Grieve *v.* Miller, 1817, ib., 68.

(*f*) 1 Bell's Com., 400. The learned Professor questions this doctrine.

(*g*) Don *v.* Watt, 26th May 1812, F. C. (*h*) Watters *v.* Barrie, 7th March 1818, F. C., noted in Hume D., 68, S. C.

[13] A bill was blank indorsed by the drawer and by the holder, and discounted by the holder at a bank. The bank clerk, by mistake, wrote above the names of the drawer and holder a special indorsation to the bank, so as to convert the blank indorsation into a special indorsation. The words were afterwards deleted; the holder ultimately paid the bill, and raised an action on it against the acceptor; who pleaded, that as the bill had been specially indorsed to the bank, and never indorsed by the bank, the holder was not indorsee; but the action was sustained on proof that the special indorsation was a mistake by the bank clerk; Mackenzie *v.* Dott, 1861, 23 D., 1310.

acceptors, and signed by them "as acceptors," and by C as cautioner for them, was held good against C as a principal obligant in a question with the creditor (*i*). This case illustrates the rule that in a question with the holder all acceptors are principal debtors, the subscription of any of them as cautioner being held only to regulate their relief among themselves (*k*).

§ 803. Where a party who meant to be indorser signed on the face of the bill, and thereby appeared as joint drawer, the Court suspended a charge against him at the instance of the drawer, the crowded state of the bill and other circumstances satisfying them that the signature had been by mistake (*l*).

§ 804. A bill addressed to two persons, and accepted by only one of them, who had written the bill, was once sustained on the ground that every one of any number of acceptors is liable *in solidum*, and that it was the duty of the acceptor who signed, and not of the holder, to get the bill completed with the other signature, if he wished to have relief to the extent of half the obligation undertaken by his acceptance (*m*).

§ 805. Erskine (*n*) lays down that, both by our law and the general custom of trading states, bills without a date are null, not only as bills, but even as grounds of action. As, however, he wrote before skeleton bills had been sustained, his authority is not of much weight. Now-a-days there seems to be no doubt that bills payable on a day named are valid without the date of drawing or acceptance; for it would be strange if writs so highly privileged as bills were null on account of wanting what is not essential to ordinary writings (*o*). It is even thought that a bill blank both in date and term of payment may found action against the acceptor; because it is as complete evidence of his obligation as a skeleton bill (*p*).[14]

(*i*) M'Dougall *v.* Foyer, 13th February 1810, F. C. (*k*) 1 Bell's Com., 399—Thomson on Bills, 14—Campbell *v.* Gibson, 1753, Elch., "Bill," No. 54—M'Dougall *v.* Foyer, *supra.* (*l*) Grieve *v.* Miller, 1817, Hume D., 68. See also Russel *v.* Mill, 1810, Hume D., 63, *supra* (*e*). (*m*) Gordon *v.* Sutherland, 1761, M., 14,677. (*n*) Ersk., 3, 2, 26. (*o*) Thomson, 61—Ivory's Note, 65, to Ersk., *supra*—Tait, 119. There may, however, be a question under the Stamp Act, where the stamp will only carry a bill at a short date. Ivory's Note, ib.

(*p*) In England "a date is not in general essential to the validity; for when a bill has no date, the time, if necessary to be inquired into, will be computed from the day it was issued or made; and if a bill of exchange be made payable two months after date, and no date be expressed, the Court will intend it to be payable two months after the day it was made"; Chitty on Bills, 148.

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[14] The date of a bill or promissory note issued without date may be proved by parole,

§ 806. Bills are probative of their dates (*r*). This is even the rule when a bill is alleged to have been falsely dated for the purpose of giving an undue preference to a particular creditor of the granter; in which case the party making such an averment must stand pursuer of the issue (*s*). But circumstances which cast suspicion on the onerosity of the transaction will shift the burden of proof (*t*). Thus where the mother-in-law of a bankrupt claimed to vote in the election of a trustee on his sequestrated estate, upon a promissory-note binding the granter to pay "sixty days after sight" a certain sum for value received in cash; and where, although the date written on the document was two years before the sequestration, the "noting" upon it was only dated three days previously; the Court refused to sustain the bill as *prima facie* proof of a debt which would entitle the creditor to vote (*u*). In another case, where a disposition by an insolvent party of his whole assets in favour of certain of his creditors was challenged by a creditor not named in it, who, founding on a bill dated the same day as the disposition, alleged that the latter had been granted to his prejudice, the Court would not apply the presumption that the bill had been accepted on the date marked on it (which was the date of drawing), although the parties to it resided in the same place, and there was no proof that any interval elapsed between the drawing and acceptance. The ground of decision probably was, that the coincidence of the bill and disposition in point of date raised some doubt upon the *bona fides* of the transaction as a bill granted on that day, and therefore its date required to be adminiculated (*x*).

§ 807. In the same way bills are probative of their dates when they are challenged on the ground of deathbed (*y*). But as this rule is designed for protecting genuine mercantile transactions, it seems not to hold where there is ground for suspecting that the bill is a device to defeat the law of deathbed; as, for example, where the

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(*r*) Ersk., 3, 2, 25—1 Bell's Com., 325—Thomson on Bills, 60—Tait Ev., 115.

(*s*) Authorities in preceding note. See *supra*, § 358—Thistle Bank *v.* Leny, 14th May 1794, Bell's Folio Ca., 5. (*t*) See *supra*, §§ 340, 357.

(*u*) Anderson *v.* Guild, 1852, 14 D., 866. (*x*) Man *v.* Walls, 1702, M., 1006; 1083. See this case questioned in 2 Bell's Com., 185. (*y*) Ersk., 3, 2, 25—Bankt., 1, 13, 20—1 Bell's Com., 325—Thomson on Bills, 60—Tait Ev., 116—Kennedy *v.* Arbuthnot, 1725, M., 1477; 12,615, S. C.—Johnstone *v.* Strachan, 1731, M., 12,616.

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provided "that summary diligence shall not be competent on any bill or note issued without a date"; 19 and 20 Vict., c. 60, § 10.

granter is not in trade and the grantee is a near relation, or where there is no trace of any transactions between the parties which could have resulted in a bill for value. In such cases it is thought that the burden of proof would be reversed, and that the date of the bill, like that of a holograph deed, would require to be proved by the party founding on it (z).

IX. *Of Informal Writings referred to in Probative Deeds.*

§ 808. It has already been seen that a deed may be construed in connection with other writings to which it refers (a). The question remains, whether it is necessary in such cases that the writing to which the reference is made should be holograph or probative.

On the one hand, if a deed refers to a writing, which is then in existence, as containing explanations, details, or the like, regarding the matters set forth in the deed, the reference will not be voided in consequence of the document referred to being informal; but the probative quality of the main deed will be communicated to the subsidiary document so far as that is necessary for the purpose of the reference. Thus it is the constant practice in contracts for extensive works to refer to scales of prices, specifications of the details of the work, and the like; which are merely signed by the parties without bearing the statutory solemnities; and documents so referred to are held to be imported into the main deeds. Thus, also, where the obligations on one of the parties, in a deed consisting of two separate sheets, were written on one page, which was signed by the parties and witnesses, but without the writer and witnesses being named or designed; and where the other party's obligations were on another page, which was both signed and probative in terms of the statute 1681, c. 5, and in which the parties bound themselves to "perform the above and within articles"; the Court sustained the whole deed, "in respect the last page was relative to the first" (b). On the same principle, where a person by a probative testament appointed an executor "subject to the payment of such bequests as I may instruct him to pay in a letter signed by

(z) Ersk., *supra*—Tait, *supra*—See *supra*, §§ 340, 357, 760. See Norris *v.* Wood, 1743, M., 4466; 12,617, S. C., where promissory-notes granted in Ireland were held not to prove their dates when challenged on the head of deathbed. But this case was decided before the privileges of bills had been extended to promissory-notes; see Tait, *supra*. (a) *Supra*, § 180, *et seq.* (b) Hamilton *v.* Moir, 1710, M., 17,028, 4 B. Sup., 814.

me of this date to the several persons therein named," declaring that after these persons had been paid, the whole residue should belong to the executor; and where the testator died two days afterwards, leaving the will and a letter within it containing directions to the executor to pay certain legacies, which letter bore the same date as the will, and was signed by the testator, but was not probative or holograph; and where the legatees offered to prove that it had been signed *simul ac semel* with the will; the House of Lords, reversing the decision of the Court below, held that the will, by referring to the improbative letter, made it effectual; and they accordingly directed the Court of Session to send the case to a jury on the question, whether the letter founded on was the one referred to in the will (*c*). On this principle, also, where certain directions by a truster to his trustees were contained in a document signed but not probative, and having appended to it an additional direction in the truster's handwriting, which commenced with the words "I add to this," &c., and was signed by the truster, and concluded thus, "wrote by myself this part of it," the Court held the whole document to be effectual (*d*). And a person may make a document written by another person effectual by adding to it, in his own handwriting, the words, "I agree to the above," or the like, and subscribing them (*e*). On the same principle, where a party left two holograph codicils of different dates, but written on the same piece of paper, only the last of them being signed, the Court held that the signature to it was sufficient to validate the first codicil also (*f*).

§ 809. Even where the writings are separate, it is not essential that the document to which the reference is made should be subscribed by the party; because the only object of the signature is to identify the separate document as that at which the reference is pointed; and the fact of the identity may be ascertained by extrinsic proof, if it is disputed (*g*). Accordingly, where a missive on which Anderson entered a certain farm took him bound to the conditions set forth in the missive of Wilkins, who was tenant in another farm on the same estate, and whose missive referred to cer-

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(*c*) Inglis *v.* Harper, 1831, 5 W. S., 785; reversing 6 S., 864. (*d*) M'Intyre *v.* Macfarlane's Tr., 1st March 1821, F. C. (*e*) Bryson *v.* Crawford, 1838, 12 S., 39. (*f*) Gillespie *v.* Donaldson's Tr., 1831, 10 S., 174, noticed *supra*, § 758 (*g*) See Wilson *v.* Glasgow and S. Western Ry. Co., 1851, 14 D., 1 —Aberdeen Ry. Co. *v.* Blaikie, 1851, 13 D., 527—Gordon *v.* Andersons, 1828, 8 W. S., 1—Russell *v.* Fraser, 1835, 13 S., 752—See also authorities cited *supra*, § 185.

tain articles and conditions drawn up by the landlord for the different farms on his property, and where Anderson, four years after his entry, signed a draft lease which referred to these conditions, they were held to be binding upon him, although he had not subscribed them, and although he alleged that he was not aware of their terms (*h*).

§ 810. On the other hand, when a trust-deed or similar writing refers to a paper of directions to be prepared under the granter's hand at some future date, it is held to mean a document holograph, or authenticated in terms of the statutes; and a writing merely signed by the party is ineffectual (*i*). Thus where a testator executed a regular trust-settlement, in which he directed his trustees to apply the residue of his estate to such purposes as he should point out by any deed, letter, or memorandum of instructions to be executed by him at any time during his life, or even on deathbed; and where he afterwards, with the intention of exercising that reserved power, signed a codicil which was neither holograph nor tested; the Court held that the document was invalid and could not receive effect as a testamentary writing (*j*). They distinguished between such a case and that of Inglis *v.* Harper (*k*), where the informal writing, being in existence, was imported into the probative deed by a reference. This distinction is also illustrated by a previous case, where a formal trust-deed directed the trustees to "hold any additional directions which I may give them as to the disposal of my property by a writing under my hand, as part of this trust-deed"; and where on the same paper as the deed there was written a codicil which directed the trustees to pay an additional legacy, and which was signed by the truster, but was not holograph or tested; and where, about a year after the date of the trust-deed, the truster executed a codicil which was written upon a separate paper, and was regularly attested; and to which a short codicil was subjoined containing a bequest to another legatee, but only signed by the truster, without being holograph or tested. The Court held that only the trust-deed and the probative codicil were valid; and they refused to sustain the other two codicils, although there was no doubt of the genuineness of the subscriptions to them, and al-

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(*h*) Gordon *v.* Anderson, 1828, 3 W. S., 1. (*i*) See the cases on this point collected and analysed in 1 Ross Lea. Ca., 415, *et seq.* As to writings formal by the law of the party's foreign domicile at the time, see chapter on foreign deeds, *infra*, § 1024, *et seq.* (*j*) Rankine *v.* Reid, 1849, 11 D., 543. (*k*) *Supra*, (*c*).

though the one appended to the trust-deed had been signed the day after that document, and the other had been signed the same day as the codicil to which it was annexed (*l*).[15]

§ 811. In this class of cases a distinction must also be drawn between a reference in one document to another for the purpose of incorporating its terms, and a mere narrative or incidental statement in a deed that the granter had subscribed another deed with certain stipulations. Such a statement does not give validity to the deed referred to; which will therefore be held null, if it is not holograph or authenticated in terms of law (*m*).

(*l*) Dundas *v.* Lewis, 1807, Hume D., 917; M., "Writ," Appx., No. 6, S. C. The case of Melvin *v.* Nicol, 1824, 3 S., 31, as reported, would seem to go against this principle, since a letter by a testator, dated sixteen years after the will to which it referred, was sustained as directing the executor to pay certain legacies. But the letter was holograph; see the case noticed by Lord Wynford in Inglis *v.* Harper, *supra*, 5 W. S., 794. (*m*) See Duff *v.* E. Fife, 1823, 3 Mur., 497; 4 S., 335; affd., 2 W. S., 166 —Boswell *v.* Boswell, 1852, 14 D., 378—Urquhart *v.* Urquhart, 1851, 13 D., 742; affd., 14th July 1853.

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[15] Recent decisions seem hardly to warrant the broad distinction drawn in the text between improbative deeds prior in date to the probative trust-deed in which they are described, or of the same date, and writings executed after the probative deed. The principle established by recent cases seems to be, that if a party convey his estates to trustees by a probative trust-disposition and settlement, he may competently declare in that deed what form of writing shall be held an authentic expression of his instructions to his trustees; and writings executed in that form will be effectual though neither holograph nor tested; and they may be effectual even although not signed. The truster can make the law as to the authentication of such writings for himself,—and what is required is, not that they should be probative writs, but that they should be identified as those described in the trust-deed, if of earlier date; or as those intended in the trust-deed, if of later date. On the other hand, if a truster provide additional formalities, such as sealing, besides the Scotch statutory formalities, as requisite to the due authentication of his deeds, writings executed by him without these additional formalities will in general be ineffectual. In Rankine *v.* Reid, quoted in the text, the Court refused to recognise an improbative codicil, mainly on the ground that the truster had not in his trust-deed dispensed with the statutory formalities. But in Baird *v.* Jaap, 1856, 18 D., 1246, the Court sustained a holograph codicil unsubscribed, because the testatrix in her trust-deed had directed her trustees to pay all legacies which she might leave by any separate writing, letter, or jotting under her hand, found in her custody or possession at her death. This codicil was of earlier date than the trust-deed. In Wilsone's Trustees *v.* Stirling, 1861, 24 D., 163, two sisters, by a mutual settlement duly authenticated, directed their trustees to pay all legacies given "by letter or other writing under our respective hands, whether formal or informal;" and the Court sustained an untested writing, subsequent in date to the trust-deed, holograph of one of the sisters, and signed by both of them. As to the essentiality of additional solemnities required by a testator, see *supra*, § 744.

How far these rules apply to deeds signed in duplicate is noticed afterwards.

CHAPTER III.—CAN DEFECTS IN THE SOLEMNITIES OF DEEDS BE SUPPLIED BY PROOF OF THEIR AUTHENTICITY?

§ 812. As the object of the statutory formalities is to secure genuine subscription, it might fairly be supposed that the want of them would not be fatal to a deed which is admitted or proved to be genuine. Accordingly, the Court under the older statutes allowed the subscriptions and designations of the witnesses, and the name and designation of the writer, when omitted, to be supplied by extrinsic proof (*a*). But the legislature took a different view. Proceeding on the principle that the validity of every deed should be a patent fact, and should not depend on extrinsic evidence, however unexceptionable, they made the statutory solemnities compulsory, by declaring (act 1681, c. 5) that all deeds in which they were omitted should be null and void. Even after the passing of this act the Court sometimes returned to the former practice (*b*). But the cases in which they did so have long since been overruled (*c*).

§ 813. It is now settled law that a deed in which the writer is not named and designed is null, and that the defect cannot be supplied by the granter's admission on record, or his oath on reference, that the subscription is genuine (*d*). In like manner a deed or missive which is signed by a party without witnesses designed and subscribing is null, and cannot be validated by proof of its authenticity (*e*). Even the latent defect that one or both of the witnesses attested the deed without seeing the granter subscribe or hearing

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(*a*) *Supra*, §§ 642, 707.

(*b*) Beattie *v.* Lambie, 1695, M., 17,021—Irvine *v.* Maxwell, 1707, M., 12,283.

(*c*) Ersk., 3, 2, 19—Tait Ev., 128—Duff Feud. Con., 25—Cases in following notes.

(*d*) Kirkpatrick *v.* Ferguson, 1704, M., 17,022—Logie *v.* Ferguson, 1710, M., 17,026—Muir *v.* Wallace, 1770, M., 8457; Hailes, 840, S. C.—M'Farlane *v.* Grieve, 1790, M., 8459; 17,057; Hailes, 1080, S. C.

(*e*) Gordon *v.* M'Pherson, 1686, M., 17,021—Gordon *v.* M'Intosh, 1710, M., 16,974; 17,029, S. C.—Russell *v.* Paisley, 1766, M., 16,904—Park *v.* M'Kenzie, 1764, M., 8449; 5 B. Sup., 639, S. C.—Sheddan *v.* Crawford, 1768, M., 8456; 5 B. Sup., 639; S. C.—Muir *v.* Wallace, *supra*—Maitland *v.* Neilson, 1779, M., 17,054—Wallace *v.* Wallace, 1782, M., 17,056—Edmonstone *v.* Lang, 1786, M., 17,057.

him acknowledge his subscription is fatal, notwithstanding an offer of proof that the party truly signed the deed (*f*).[16]

§ 814. The act 1579, c. 80, in directing persons who cannot write to use two notaries and four witnesses, instead of one notary and two witnesses as formerly, does not declare that deeds subscribed in the old form shall be null, but only that they shall "mak na faith;" and the nullity declared in the act 1681, c. 5, does not embrace this class of cases. Accordingly, deeds signed by only one notary and two witnesses have been sustained, on the party founding upon them proving that the granter authorised the subscription (*g*). But there are several contrary decisions (*h*). And it is probable that the Court would exact the statutory requisite as essential to deeds signed notarially, unless falling under one or other of the classes of privileged documents (*i*).[17]

CHAPTER IV.—OF *REI INTERVENTUS*.

§ 815. Informalities in deeds which require the statutory solemnities, and the want of writing, where that is usually required for the constitution of the obligation in issue, may be overcome by *rei interventus* (*a*).[1] This doctrine is an equitable qualification of the

(*f*) Young *v.* Ritchie, 1761, M., 17,047—Duff *v.* E. Fife, 1825; 3 Mur., 497; 4 S., 385; affd., 2 W. S., 166. (*g*) Redpath *v.* Huntley, 1611, M., 17,011—Weir *v.* Moffat, 1609, M., ib.—Sheil *v.* Crosbie, 1739, M., 16,842; 17,033; 5 B. Sup., 210; ib., 667; Elch., "Writ," No. 8, S. C. (*h*) Smith *v.* Weddear, 1627, 1 B. Sup., 289—Rollands *v.* Rolland, 1767, M., 16,851—Swinton *v.* Brown, 1688, M., 3412; 8408, S. C. See also Philip *v.* Cheap, 1667, M., 16,835; 17,019; 1 B. Sup., 544; S. C.

(*i*) See Duff Feud. Con., 25. (*a*) In order to avoid repetition the rules as to *rei interventus* proceeding on verbal obligations will be considered along with those regarding *rei interventus* on informal deeds.

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[16] Improbative cautionary obligations, not being *in re mercatoria*, and improbative acknowledgments for borrowed money, have been held *per se* not to create obligation though the subscriptions of the parties were acknowledged; Church of England Life and Fire Assurance Co. *v.* Hodges, 1857, 19 D., 414; and Petition G. Brown, 1794; and Petition Francis Carlyle, 1788, noted 19 D., p. 417, 418—Hamilton's Executors *v.* Struthers, 1858, 21 D., 51.

[17] A disposition and settlement of heritage and moveables, subscribed by two notaries for the granter, was reduced *in toto*, because one of the notaries was disqualified, being a trustee under the deed; Ferrie *v.* Ferrie's Trustees, 1863, 25 D., 291.

[1] *Rei interventus* is matter of replication, and therefore when a party raised an action

rule, that wherever writing is requisite the parties are entitled to resile so long as they have not executed, and (if necessary) delivered, a valid deed. The doctrine "is grounded on the fact of the person, otherwise imperfectly bound, having permitted another to proceed on his obligation or agreement as if it were complete, and to perform on the faith of it acts unequivocally referable to or resulting from the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed" (*b*).[2] Wherever such *rei interventus* has taken place, *locus penitentiae* is barred, and the obligation must be implemented.

§ 816. As the object of the rule, therefore, is to obviate defects in the form of contracts really undertaken, and not to force upon any one an obligation to which he did not consent, it is essential that real, although not formal, consent be admitted or proved. Thus where a factor, whose factory did not contain power to grant leases, made an agreement with a tenant for a new lease for nineteen years upon an increased rent, and entered the farm at the new rent in a rental book of the estate, and where the tenant possessed for eleven years and paid the increased rent during the whole of that period, the lease was held not to be binding on the landlord, who denied that he had either authorised the factor to grant the alleged new lease, or had been aware of the arrangement (*c*). Thus, also, where a tenant maintained that he held a lease for years, in respect of his possession following upon informal documents which had passed between him and the father of his landlord, who although still in minority was past pupillarity, the Court, without requiring the proof of the alleged possession to be laid before them, rejected the tenant's claim; and the House of Lords affirmed the judgment; one of the grounds of which was, that the landlord's father had not power to grant leases during his son's minority (*d*). Thus, also, where a paper of proposals for a marriage-contract had been deli-

(*b*) 1 Bell's Com., 329—See also Ersk., 3, 2, 3—Tait Ev., 131, 227, *et seq.*

(*c*) Campbell *v.* Robertson, 1797, noted in Hume D., 849. There were other elements also in this case.—See a similar case, Sharp *v.* Napier, 1822, 1 S., 477.

(*d*) Pentland *v.* Scott, 1829, 7 S., 502; affd., 5 W. S., 28.

on an informal bond, he was permitted to add on revisal the facts and circumstances on which he founded a plea of *rei interventus;* United Mutual Mining and General Life Assurance Society *v.* Murray, 1860, 22 D., 1185.

[2] But *rei interventus* may take place by proceedings of the one party of which the other party is not aware; see *infra*, § 842.

vered to the wife's brother, but had not been shown to her or her father, it was held not to have been raised into a binding contract by the subsequent marriage (*e*). On the same principle, where there were several parties to a lease, and some of them had entered into a new lease which had been followed by possession, a co-lessee, who had not been a party to the new agreement, was held not to be bound by it, because he had not consented to it, and the slight increase of rent which had been paid for the possession of the year following upon it was unimportant as a circumstance against him, seeing that the rent under the former lease had varied in different years (*f*).

§ 817. On this principle, also, a deed to which one party's name is forged will not be made effectual by the other party having acted on the faith of it (*g*); and *rei interventus* will not give effect to an obligation written on a piece of paper which the party signed for a different purpose (*h*). So an improbative deed of settlement, followed by possession during the testator's life, is not effectual as a conveyance *inter vivos*, because that is essentially different from the deed which the party intended to execute (*i*).

§ 818. It follows from the same principle that a writing signed by a person while under curatory, without the consent of the curator, is ineffectual, although it be followed by *rei interventus* (*k*). An antenuptial contract entered into by a minor having curators, not having been signed by a quorum of them, was held not to be *ipso jure* null (lesion not being proved); and it was observed that the doctrine of the nullity of a deed entered into by a minor without consent of his curators is not so absolute as to undergo no qualification (*l*).

§ 819. For the same reason, possession or other *rei interventus* will not render a draft or offer for a lease obligatory, where the parties had not finally agreed on its terms (*m*). In such a case the acts founded on were performed in the expectation or hope of a future contract, not on the faith of one already concluded. The same principle applies where the alleged contract contained some condition precedent, which was not complied with, as in the case of a

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(*e*) Campbells *v.* M'Glashan, 5th June 1812, F. C. (*f*) Graham *v.* Orr, 1831, 10 S., 135. (*g*) Skelton *v.* M'Laren, 1816, Hume D., 106—Falconer *v.* Falconer, 1830, 8 S., 312, per Lord Gillies. (*h*) See Mackenzie *v.* Stewart, 1848, 10 D., 611. As to skeleton bills see *supra*, §§ 648, 651. (*i*) Boyes *v.* Dinwoodies, 1800, Hume D., 910. (*k*) Primrose *v.* L. Rosyth, 1579, M., 5980.

(*l*) Bruce *v.* Hamilton, 1854, 17 D., 265. (*m*) Cairns *v.* Gerrard, 1833, 11 S., 737—Alexander *v.* Montgomery, 1773, 2 Pat., 300.

lease where the landlord stipulated for caution for the rent, and the tenant possessed for six years without having found caution (*n*); and where written communings for a contract provided that there should not be a concluded agreement until a formal deed had been executed, but the possession took place without that condition having been fulfilled (*o*).[3]

The effect of homologation upon deeds originally deficient in the granter's consent is noticed afterwards (*p*).

§ 820. As to the informalities which *rei interventus* will overcome there is no limit. It operates when the deed is probative *ex facie*, but labours under a latent objection, *e.g.*, that the witnesses did not see the party sign, or hear him acknowledge his subscription (*r*); that the notaries did not subscribe *unico contextu* (*s*); or that the deed was not executed before the witnesses and at the place mentioned in the testing clause (*t*).

§ 821. Patent informalities, also, fail to invalidate a deed which has been followed by *rei interventus*. For example, this has been held as to the non-subscription of witnesses (*u*), the subscription of only one notary and fewer than four witnesses (*x*), and as to the want of designation of the writer (*y*), and of the witnesses (*z*). In like manner a marriage-contract in the English form, but wanting the solemnities required by Scotch law, was allowed to affect the husband's heritage situated in this country; marriage having followed on the faith of it (*a*).

§ 822. Documents merely signed by the parties without any

(*n*) Cairns *v.* Gerrard, *supra*. (*o*) Alexander *v.* Montgomery, *supra*. See *supra*, § 604. (*p*) *Infra*, § 852, *et seq.*, on homologation. (*r*) Smith *v.* Bank of Scotland, 25th Jan. 1821, F. C., as noticed by Lord Glenlee in E. Fife *v.* Duff, 1825, 4 S., 335. (*s*) M'Morran *v.* Black, 1624, M., 16,830. 17,012—Gow *v.* Craig, 1633, M., 17,017. (*t*) Martin *v.* Wingate, 1828, 6 S., 859. (*u*) Grant *v.* Grant, 1753, M., 13,841—Telfer *v.* Hamilton, 1735, M., 17,032. (*x*) Lockie *v.* ——, 1627, M., 17,014—Grieve *v.* Cant, 1626, M., 5681—Muir *v.* Crawford, 1628, M., 17,014—Cheap *v.* Mowat, 1626, M., 17,014—Nisbet *v.* Newlands, 1630, M., 5682; 17,016—Grierson *v.* Scotts, 1699, M., 17,022—Crosbie *v.* Shiell, 1739, M., 16,842.

(*y*) Buchanan *v.* Buchanan, 1775, M., 17,051—Wolf *v.* Scott, 1636, M., 17,017.

(*z*) Hamilton *v.* Wright, 1836, 14 S., 323; affd., 3 Sh. and M'L., 127—Kibbles *v.* Stevenson, 1831, 5 W. S., 553—Falconer *v.* Falconer, 1830, 8 S., 312—Taylor *v.* Grieve, 1800, M., "Arbitration," Appx., No. 8. (*a*) Bushby *v.* Renny, 1825, 4 S., 110.

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[3] But possession on an informal lease, before the date of entry but on the faith of the lease, would probably be held to validate it *rei interventu;* Pratt *v.* Abercromby, 1858, 21 D., p. 21, per Lord Benholme.

further authentication have repeatedly been sustained, where *rei interventus* had ensued upon them (*b*).

§ 823. *Rei interventus* will validate deeds signed by initials without the statutory solemnities (*c*), and deeds signed by a cross or mark (*d*).

§ 824. Even the want of subscription by one of the parties to a mutual contract may be obviated by this means, provided he truly consented to the agreement recorded in the deed (*e*). Thus a missive signed only by the tenant, and found in the landlord's repositories (*f*), or a missive signed by the landlord and delivered to the tenant (*g*), constitutes a binding lease, if possession followed upon it. Thus, also, a marriage-contract signed by the husband and by the wife's father, but not by her, was set up by marriage and payment of tocher on the faith of it (*h*); and an agreement between the father and mother of an illegitimate child for its aliment, having been signed by the father and the mother's brother, but not by the mother herself, and having been acted upon by the parties, was held to be effectual (*i*). And where one of three parties to a submission as to their respective rights of pasturage, agreed verbally to the terms of the submission as contained in an informal letter, which was signed by the others, but not by him; and where he appeared and adduced witnesses under the reference; the decree-arbitral was held to be effectual against one of the parties who had signed the letter, but who contended that, as it had not been signed by all the parties, it was not binding upon any of them (*j*).

§ 825. A written agreement, which both parties have neglected to sign, will even be effectual as the measure of their contract, if *rei interventus* has followed on the faith of its being implemented (*k*).

§ 826. In all cases where the signature of both or either of the

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(*b*) See, for example, Duncan *v.* Barron, 1752, M., 16,984; 15,177, S. C.—Goodlet Campbell *v.* Lennox, 1789, M., 16,979—Manderson *v.* M'Minn, 1802, Hume D., 90—Balfour *v.* Thomson, 1806, ib., 94—Grant *v.* M'Donald, 1827, 5 S., 817—Johnstone *v.* Grant, 1844, 6 D., 875. (*c*) M'Arthur *v.* Simpson, 1804, M., 15,181.

(*d*) M'Neil *v.* Black, 1814, Hume D., 103—Neil *v.* Vashon, 1807, ib., 20.

(*e*) See More, 67, and cases there cited. (*f*) Stewart *v.* Countess Moray, 1772, 2 Pat., 317; reversing, M., 4893—Graham *v.* Gowans, 1792, Hume D., 784—Ross *v.* Ross, 1790, ib., 774—Gordon *v.* Anderson, 1828, 3 W. S., 1. (*g*) Arbuthnot *v.* Campbell, 1793, Hume D., 785—Murdoch *v.* Moir, 18th June 1812, F. C.—M'Pherson *v.* M'Pherson, 12th May 1815, F. C.—Home *v.* Home, 1684, M., 8421.

(*h*) Wemyss *v.* Wemyss, 1768, M., 9174. (*i*) Gibb *v.* Ogg, 1835, 13 S., 612.

(*j*) Brown *v.* Gardner, 1739, M., 5659; 8474, S. C. (*k*) Gordon *v.* Carmichael, 1800, Hume D., 805—Grieve *v.* Pringle, 1797, M., 5951—Cases *infra*, § 827.

parties is awanting, it is essential to ascertain whether the defect arose from inadvertance, or from the want of substantial consent. If it arose from the latter cause, the contract is ineffectual, not only as against the non-subscribing party, but also as against those who subscribed; because each contracting party is in law presumed to bind himself on the understanding and condition that all the others shall be bound also. Accordingly, where a letter of guarantee had originally been meant to be granted by two persons, and had been written "We the undersigned," &c., but had been subscribed by only one of the parties, and been altered into "I the undersigned," and had been followed by advances on the faith of its validity, the Court held that it was not binding on the party who had signed it, there being no proof that he had agreed to be bound as sole cautioner (*l*). On the same ground, where a cash-credit bond in the name of five parties took them all bound *in solidum* for advances made to one of their number, but where one of the intended cautioners refused to sign it, and money was advanced on the faith of the obligation as partially signed, the Court held that it was not effectual against those who subscribed, although the bank had not specially undertaken to get it signed by all the parties (*m*).[4] Of course the principal debtor would have been bound notwithstanding the omission; as his obligation could not have been contingent on the subscription of the persons who joined him in the bond. And if the conduct of the parties subscribing, or their writs or oaths, had shown that they intended to be bound nothwithstanding the non-subscription of the party who had refused to sign, they would have been held liable in the same manner as if the deed had run in their names

(*l*) Loudon *v.* Jackson, 1825, 3 S., 558. (*m*) Paterson *v.* Bonar, 1844, 6 D., 987.

[4] Money was advanced in loan, on an obligation bearing to be granted by five parties, four of them being cautioners. Three of the cautioners signed the bond, and the principal obligant forged the name of the fourth; it was held not binding on any of the cautioners; Scottish Provincial Assurance Co. *v.* Pringle, 1858, 20 D., 465. But where a bond of caution in a suspension, bore to be signed by two cautioners, and one signature proved to be a forgery; the Court, reversing the judgment of Lord Kinloch, held the other cautioner liable in all the obligations under the bond. The distinction taken between a bond of caution in a suspension and a bond of caution in favour of a creditor, being, that in the latter case the caution is demanded by the creditor as the condition of advancing the money, or not calling up the money advanced. In the former case the bond is the deed of the suspender, and originates with him; the endeavour of the charger is to get the note of suspension dismissed, and the bond of caution is forced on him; and he is entitled to leave the procuring of caution entirely to the suspender, subject to the control exercised by the officials in the Bill Chamber; Simpson *v.* Fleming, 1860, 22 D., 679.

alone (*n*). There are also writings which, although in the form of mutual deeds, really contain independent provisions, and in which, therefore, the want of authentic subscription by one party does not annul the deed as to the other. An example of this has already been given in the case of a mutual will by a husband and wife, which was sustained as a holograph will of the former, although, if the wife had predeceased, it would not have been effectual as her will, because it was not legally attested (*o*).

§ 827. Again, although the proper purpose of the writing founded on is not to bind the parties to a concluded agreement, yet if they intended it to do so, the right to resile from its stipulations will be barred by *rei interventus.* This is often exemplified in leases, where documents not framed as formal deeds, but followed by the tenant's possession on the faith of their being implemented, have been held to constitute agreements for the periods stipulated. One case of this kind is mentioned above, where the documents sustained were a missive offer signed by the tenant, and a draft lease prepared in accordance with it, and signed by him four years after his possession had commenced (*p*). In another case, where a draft lease written by the husband of the proprietrix and delivered to the tenant, but not signed by either party, had been followed by possession and by payment of rent upon receipts for the first and second half-year's rents "under the new tack," the Court held that the tenant possessed on a written lease for the time specified in the draft, being satisfied that the parties had completed an agreement in accordance with it (*r*). On the same principle, where a landlord signed a memorandum for preparing a new lease to one of his tenants, and handed it to a person who managed his money matters in London, with directions to transmit it to the local factor for behoof of the tenant, who was sister of both these persons; and where the tenant possessed for some time after the expiry of her old lease, and certain letters were written by the landlord to the local factor, which referred to the tenant's possession as one for years, and proposed a new arrangement on the footing of her being remunerated for loss of profits if the lease was interrupted; the Court held that in the whole circumstances the tenant possessed on a written lease for years, as the memorandum had been intended to be binding on the landlord, and the possession was to be attributed to that title (*s*).

(*n*) See Macdonald *v.* Stewart, 5th July 1810, F. C.

(*o*) M'Millan *v.* M'Millan, 1850, 13 D., 187. (*p*) Gordon *v.* Anderson, 1828, 3 W. S., 1—*Supra*, § 809. (*r*) Grieve *v.* Pringle, 1797, M., 5951.

(*s*) Mackenzie *v.* Mackenzie, 1799, Hume D., 801.

In another case a letter addressed by the principal factor on an estate (who had power to grant leases) to the local sub-factor, and delivered by the latter to the tenant, having been followed by possession and payment of rent in accordance with its terms, was sustained against a singular successor of the landlord (*t*). On the same principle, an obligation (although not holograph or tested) to grant a lease, if delivered and followed by *rei interventus*, is effectual (*u*). And where, shortly before a sequestration had been wound up on a composition-contract with cautioners under a regular bond of caution, the bankrupt, at the desire of the trustee in the sequestration, obtained from another person a holograph letter authorising the bankrupt to propose him as a security for the trustee's commission; which letter was handed to the trustee, but was not laid before the creditors, or mentioned in the proceedings relative to the bankrupt's discharge; in an action by the trustee against the writer of the letter, the Court held that, as it formed part of the consideration upon which the trustee consented to the discharge, it was effectual as a cautionary obligation in his favour (*x*).[5]

§ 828. *E converso*, a mere memorandum by a landlord on the margin of his ledger, mentioning the term of a tenant's possession to be fifteen years, having been followed by possession for part of that period, was held not to constitute a written lease for the whole term, the landlord having deponed that it was merely a note of a verbal arrangement which the parties had made for a lease during the time mentioned (*y*). In reporting this case Baron Hume observes, "It is true that of late years much equitable favour has been shown to tenants, in sustaining written titles of possession for a term of years, though imperfect or informal, if they have been followed with possession and payment of rent. And this seems to be right where the writing, irregular and unshapely as it is, appears, however, to have been intended by the parties at the time as the permanent evidence of a finished agreement. But it would be against all principle (and this length the Lords have never gone)

(*t*) Arbuthnot *v.* Reid, 1804, Hume D., 815. (*u*) Grant *v.* Richardson, 1788, M., 15,180—Garioch *v.* Forbes, 1750, M., 15,177—Sutherland *v.* Hay, 1845, 8 D., 283. (*x*) Tweedie *v.* M'Intyre, 1823, 2 S., 361. (*y*) Maxwell *v.* Grierson, 1812, Hume D., 849.

[5] Pencil jottings in a tenant's books, signed by landlord and tenant, and followed by possession, were held to constitute a binding contract; Williamson *v.* Kennedy, 1857, 19 D., 443.

to sustain to the same effect some brief note or occasional memorandum, made by the landlord for his own private use, or some transient and incidental mention of terms of set in a writing destined for some quite different purpose—for instance, a receipt for rent. In signing such a receipt, unless it utterly deviates from the usual style, the landlord cannot be presumed to have had anything more in view than to acknowledge and discharge a payment of rent. I have a note accordingly, but without the names of parties, of a judgment given to that effect on the 10th of March 1798. The Court refused in this instance to sustain as a written title of possession, a receipt for rent signed by the landlord, written however by the tenant, which bore that the money was paid as the first year's rent of the new tack for twelve years." In another case, where a tenant averring a nineteen years' lease, founded on receipts by the landlord's factor for rent for eleven years, and an entry in the rental-book kept by the factor mentioning the farm as let at the new rent for nineteen years, the Court, treating these documents as if they had been written by the landlord, held that they were insufficient to constitute a lease under a written title (*z*).

These cases, accordingly, show that different effects may follow from *rei interventus* upon an informal writing by which the parties intended to constitute their agreement, and upon the writ of party *ex post facto* proving a verbal agreement between them. The importance of this distinction in contracts of lease and service will be seen immediately.

§ 829. The same equitable principle which excludes *locus penitentiae* from an informal written contract, dispenses with the necessity for writing in obligations which could not have been contracted verbally, if matters had been entire; such obligations being effectual when they have been followed by *rei interventus* (*a*). This is the rule, however important the subject may be; as, for example, in verbal feu-contracts (*b*), verbal sales of heritage (*c*), verbal con-

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(*z*) Campbell *v.* Robertson, 1797, noted in Hume D., 849. There was also a question as to the factor's powers to grant a lease; see *supra*, § 816.

(*a*) Erak., 3, 2, 3. (*b*) Rait *v.* Galloway, 1883, 12 S., 181.

(*c*) In Lawrie *v.* Craik, 1697, M., 8425, a verbal sale of heritage was held to be effectual on account of part of the price having been paid. In E. Kinghorn *v.* Hay, 1674, M., 8414, a verbal agreement for the sale of lands was sustained, in consequence of the seller having purchased up a mid-superiority in order that the purchaser might hold as a crown vassal, which had been part of the bargain. In Thomson *v.* Thomson, 1699, M., 8426, a verbal sale of a house, having been followed by delivery of the keys and titles, by a year and a half's possession by the purchaser, who during that time had en-

stitutions of servitude (*d*), excambion (*e*), and submission as to heritage (*f*).

In like manner, a promise by a superior to enter an intending purchaser of the property, without exacting the usual casualty, having been followed by the purchase on the faith of the promise being performed, was held to be effectual (*g*); and a verbal consent by a proprietor in a burgh to a neighbouring proprietor building some distance into the street, having been acted upon by the building being proceeded with, *locus penitentiae* was held to be excluded (*h*).[6]

§ 830. With regard to verbal leases there is an important distinction depending on the extent and nature of the *rei interventus*. As already mentioned, a verbal lease for a number of years may be resiled from at the end of each year, and possession will not make it binding on either party beyond the year current (*i*). Accordingly, if the *rei interventus* founded on can be fairly ascribed to a right of possession from year to year, it will not make a verbal lease for a number of years effectual; whereas such *rei interventus* as cannot be reconciled with a lease for one year will prevent either party from resiling from the verbal contract for the whole term (*k*).

§ 831. Thus, on the one hand, a verbal lease for a number of

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tered into a contract with a third party as to building a wall to the premises, was held to be binding. In Moodie *v.* Moodie, 1745, M., 8439, where three heirs-portioners resolved to set up their shares to roup among themselves, and Ann intending to purchase agreed verbally with Agnes to pay a certain sum for her share without reference to the price which should be fixed at the roup; and on the faith of that arrangement Ann made the highest offer for the whole, and was preferred; whereupon Agnes refused to implement the verbal bargain; the Court held that *locus penitentiae* was excluded, as Ann had made the purchase on the faith of the contract being implemented.

(*d*) Kincaid *v.* Stirling, 1750 (Kilk.), M., 8404—Ivory's Erak., 428, note 182.

(*e*) L. Melville *v.* Douglas' Tr., 1830, 8 S., 841. (*f*) Brown *v.* Gardner, 1789, M., 5659; 8474—Pro-Fiscal of Roxburgh *v.* Ker, 1672, M., 12,410—L. Livingston *v.* Falhouse Feuars, 1662, M., 2200. (*g*) Gordon *v.* Pitsligo, 1674, M., 8415. (*h*) M'Lean *v.* Richardson, 1834, 12 S., 865. (*i*) *Supra*, § 548. (*k*) 1 Bell's Com., 329—Bell's Pr., § 1189—Ivory's Note 96 to Erak., 2, 6, 21—Tait Ev., 229—1 Hunter on Land. and Ten., 353.

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[6] But the verbal agreement itself cannot be proved except by writ or oath. See Gowans *v.* Carstairs and Walker *v.* Flint, *infra*, § 832, note [7]. Where a party made a written offer to take a piece of ground in feu, and the offer was accepted in writing, but under certain conditions, and where the feuar took possession and acted as proprietor, it was held that a valid feu-contract was completed, and that the conditions of the acceptance formed conditions of the contract; Colquhoun *v.* Wilson's Trustees, 1860, 22 D., 1085.

years, followed by possession and ordinary improvements in cultivation and management, will not prevent *locus penitentiae* at the end of each year (*l*). And this was held to be the rule, where the tenant had possessed on a written lease, which was verbal as to the term of endurance (*m*); and where, in a judicial rental of the lands, the tenant had deponed that he possessed on a verbal tack for nineteen years, and to that effect had subscribed a written oath, which had been left with the landlord's factor (*n*).

§ 832. On the other hand, verbal leases for several years have been sustained where the tenant had paid a grassum on his entry (*o*); where he had spent considerable sums in improvements, building offices and the like (*p*); and where he had converted the subject of the lease (a field of four acres) from common arable into garden ground (*q*);—these being substantial acts in implement of the contract as for the whole term agreed upon. Accordingly, an old decision (*r*) is erroneous, in which the Court refused to sustain a verbal lease of a house for nine years, where the tenant had, at considerable expense, altered the partitions and reared up pews, in order to convert the premises into a meeting-house. It is also difficult to reconcile with later authorities an old case, where the tenant under a verbal lease for years was allowed to resile, although he had entered to a part of the farm, and the landlord had built barns and byres in the contemplation of the lease being completed; the Court considering that, as these would serve for any other tenant, the landlord would not be prejudiced by the resiling (*s*).[7]

§ 833. But while a verbal lease for years, if followed by substantial *rei interventus*, is effectual against the landlord and his heirs,

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(*l*) *Supra*, § 548; and authorities cited *supra*, § 828—Keith *v.* Johnstone's Tenants, 1636, M., 8400—Buchanan *v.* Baird, 1773, M., 8478—A *v.* B, 1791, M., 15,181—M'Rorie *v.* M'Whirter, 18th Dec. 1810, F. C. (*m*) Clark *v.* Lamont, 27th Jan. 1816, F. C.—M'Rorie *v.* M'Whirter, *supra*. (*n*) Stewart *v.* Leith, 1766, M., 15,178; Hailes, 174, S. C. (*o*) A *v.* B, 1553, M., 8410; 15,209—M'Rorie *v.* M'Whirter, 18th Dec. 1810, F. C.—Bell's Com., *supra*—Ivory's Note, *supra*. (*p*) M'Rorie *v.* M'Whirter, *supra*. (*q*) Campbell *v.* Dougall, 1813, Hume D., 861.

(*r*) M'Kenzie *v.* Trotter, 1729, M., 8487; questioned in More's Notes, 67.

(*s*) Skene *v.* ——, 1637, M., 8401.

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[7] Contracts of lease for a term of years, like other contracts relating to heritage, can be proved by writ or oath only; if the contract which is so proved be a verbal contract, it will not be binding because there will be *locus penitentiae* to the parties, unless *rei interventus* has followed on the contract. The *rei interventus* may be proved by parole evidence, and will bar *locus penitentiae;* Gowans *v.* Carstairs, 1862, 24 D., 1382—Walker *v.* Flint, 1863, 1 Macph., 417.

it is not binding upon his singular successors; as these are not affected by any lease which has not been reduced to writing and followed by possession (*t*).

§ 834. A verbal contract of service for years is analogous to a verbal lease in this respect, that either party may resile from it at the end of each year, although the service has been entered upon, or although the contract has been followed by any other *rei interventus* which is consistent with one year's service (*u*). On the same analogy, and on the justice of the case, it is thought that if the verbal contract has been followed by such *rei interventus* as is inapplicable to a term of only one year (*e.g.*, payment of a high premium on entry), it will be sustained for the full period stipulated.

§ 835. It has been already observed that, in general, writing is not essential *ex solennitate* to the constitution of cautionary obligations (*x*). Consequently, as there is not *locus penitentiae* from the verbal undertaking, the doctrine of *rei interventus* is usually inapplicable in this class of obligations. But in those cases where writing is usually interposed (*y*), and where a party when agreeing verbally to become cautioner is therefore presumed to have in view a subsequent written obligation, it may be a question whether *rei interventus* on the verbal undertaking will make it binding. If the interposition of writing in such cases is to be regarded as a condition suspensive of the obligation, then *rei interventus* upon the verbal agreement will not render it effectual (*z*). This view derives support from two decisions (*a*). But the analogy of the rule as to verbal obligations regarding heritage is against holding that a verbal cautionary obligation in the cases referred to is ineffectual where the obligant did not stipulate that he should be free until writing should have intervened, and where *rei interventus* followed on the faith of the verbal undertaking.[8]

(*t*) 1449, c. 18—Stair, 2, 9, 4—Erek., 2, 6, 24, 5—2 Ross' Lec., 475—Bell's Pr., § 1189—1 Hunter on Land. and Ten., 480. (*u*) *Supra*, § 546.

(*x*) *Supra*, § 597. (*y*) See these mentioned *supra*, § 598.

(*z*) *Supra*, §§ 603, 819. (*a*) Shirra *v.* Douglas, 1798, M., 16,946—Chaplin *v.* Allan, 1842, 4 D., 616—See also *supra*, § 603.

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[8] A cautionary obligation not *in re mercatoria* is *literarum obligatio* at common law, to be evidenced by a deed executed with the solemnities of the statute 1681. But an informal cautionary obligation may be validated *rei interventu*; Church of England Life and Fire Assurance Co. *v.* Hodges, 1857, 19 D., 422—Lord Justice-Clerk Hope. All guarantees and cautionary obligations made after 21st July 1856 must be in writing,

§ 836. Verbal contracts for the sale and transference of incorporeal moveable rights may be validated by *rei interventus* (*b*). This, however, will not hold as to verbal transmissions of patents or copyrights, for which writing is a statutory requisite (*c*).[9]

§ 837. Having thus explained the cases in which *rei interventus* operates, we proceed to consider the characteristics of the acts which constitute it.

Their primary requisite is, that they unequivocally refer to the informal or verbal agreement, and took place in consequence of it (*d*). This principle is seen in the rules already noticed regarding verbal leases (*e*). It is well illustrated by a case where an agreement to become cautioner was contained in an informal missive, which mentioned that a regular bond for the contemplated advance was to be executed by the principal and cautioner; and where a bond, apparently formal, bearing their signatures, was delivered to the creditor some time afterwards, on the faith of which sundry advances were made by him to the principal; but it turned out that the supposed signature of the cautioner was a forgery. The creditor thereupon contended that the missive followed by the advances was binding; but the cautioner replied that the advances were made on the faith of the forged bond, and not of the missive; and the Court sustained that defence (*f*). On the same principle, where a party had for several years been tenant in two farms, and on being sued for the rent of one of them pleaded that it had been let to his son on a new lease; to prove which he founded on a scroll lease to that party; the Court repelled the defence on the ground (*inter alia*) that there had been no change of possession, and, therefore, no *rei interventus* clearly attributable to the alleged new lease (*g*). In another case, where a landlord failed to establish a

(*b*) Clark *v.* Callander, 9th March 1819, F. C.; affid. 9th June 1819—Graham *v.* Corbet, 1708, M., 8428. (*c*) See *supra*, § 558. (*d*) 1 Bell's Com., 829.
(*e*) *Supra*, § 830, *et seq.* (*f*) Skelton *v.* M'Laren, 1816, Hume D., 106.
(*g*) Pentland *v.* Scott, 1839, 7 S., 502.

"otherwise the same shall have no effect"; 19 and 20 Vict., c. 60, § 6. See *supra*, § 601, note [4]. "Innominate contracts, especially such as are of an unusual character, cannot be constituted verbally, or proved by witnesses. Nor does it alter the rule that *rei interventus* upon such verbal and innominate contracts is alleged; for the uncertainty as to the terms of an innominate verbal contract, renders it impossible to determine what acts can be considered as constituting a partial performance, or *rei interventus* following upon it"; Edmonston *v.* Bruce, 1861, 23 D., 995, per Lord Benholme.

[9] See *supra*, § 558, note [4].

lease under an unsigned tack followed by possession, an important circumstance against him was, that he had raised action against another person for implement of a lease of the subject for the same period (*h*).[10]

§ 838. Contrasted with these cases is one in which it appeared that during the currency of a verbal lease, a new lease was entered into by an informal missive signed only by the landlord, and improvements were executed by the tenant on the faith of it being implemented, but before the term of entry under it commenced. The Court held that they constituted sufficient *rei interventus* (*i*). And where an informal letter of guarantee for past and future furnishings had been followed by furnishings on the faith of it, these were held to be *rei interventus* upon both parts of the obligation; because it was one transaction, and the subsequent furnishings would probably not have been made, unless security had been found for the unpaid price of the others (*k*). Thus, also, where an informal tack of teinds had been followed by possession, the Court sustained it in favour of the lessor's assignee, and overruled the lessee's defence that he had possessed under a formal lease, which he had procured from the parson after the date of the lease sued upon (*l*).

§ 839. What amount or description of acts will constitute *rei interventus*, has occasioned some discussion. Lord Kilkerran, in reporting a case which has often been quoted, states, "The rule by which it is to be judged whether *res* be *non integra*, so as to exclude the *locus penitentiae*, was laid down to be this, that whenever anything has happened on the faith of the verbal agreement, which cannot be recalled, and parties put in the same place as before, then *res* is understood not to be *integra*, and there is no longer *locus penitentiae*" (*m*). This definition has not been adopted by subsequent jurists (*n*); and in particular it has been challenged by the first Lord Meadowbank, who observed that "there is in it a con-

(*h*) Girdwood *v.* Wilson, 1834, 12 S., 576. (*i*) Murdoch *v.* Moir, 18th June 1812, F. C. (*k*) Paterson *v.* Wright, 31st Jan. 1810, F. C.; affd., 4th July 1814 —See also Robertson *v.* Galloway, 1821, 1 S., 204. (*l*) Home *v.* Home, 1684, M., 8421. (*m*) Moodie *v.* Moodie, 1745, M., 8439. (*n*) 1 Bell's Com., 329—More's Notes, 66—Authorities in following notes.

[10] A party took possession of a mineral field under an informal missive, by which he was to have twelve months to prove the ground, and other twelve to erect machinery; he remained in possession thirty months, and he was held bound by the missive, though he pleaded he had done nothing but prove the field, which he had found not workable to profit; Sinclair *v.* Mossend Iron Co., 1854, 17 D., 258.

founding of the *restitutio in integrum* with the *rei interventus*" (*o*). But it can hardly be supposed that the learned Judges whose views Lord Kilkerran reported, and that eminent lawyer himself, would have confounded two matters so completely distinct. The error merely lay in stating as the essential characteristic of acts of real intervention that which is a frequent, but not an indispensable, quality in them (*p*). A better description is given by Lord Corehouse, and adopted by Lord-Chancellor Brougham—"To constitute a *rei interventus* it is not necessary that the party against whom it is pleaded should derive benefit from what has been done. It is enough if the party who pleads it is placed in circumstances on the faith of the agreement by which his interest would suffer if it were not implemented" (*r*). Professor Bell states the doctrine in similar terms: "There must (he says) be an inconvenience or alteration of circumstances to the party who has been led to rely on the agreement, though the change is not required to be irreparable. It is sufficient that it be considerable, and that the disappointment would be attended with loss" (*s*). In fact, the doctrine is the counterpart of that which allows either party to resile from an informal agreement, provided he exercise his right before the other party has taken such steps on the faith of the contract, that its non-implement would occasion him material damage. That *rei interventus* may arise where the acts could be recalled, and the parties placed in the same situation as at the date of the contract, is shown by the numerous cases in which such acts as payment of part of the price of the subject sold, and entering to the possession of it, have been held to bar *locus penitentiae.*

§ 840. Acts of real intervention often involve the principle of homologation, by partial implement of the contract on the side of him who afterwards attempts to resile from it. For example, this is so in regard to payment and receipt of part of the price of the subject sold; and where the party who seeks to resile had commenced to act under the contract; and in cases of submission, where he had appeared and pleaded in the reference, but afterwards refused to implement the decree-arbitral on the ground of informality in the contract of submission.

§ 841. *Rei interventus* may also arise from the independent acts of the party who wishes to enforce the contract. This is illus-

(*o*) Dunmore Coal Co. *v.* Young, 1st Feb. 1811, F. C. (*p*) See Bell's Com., and More's Notes *ut supra.* (*r*) Hamilton *v.* Wright's Tr., 1836, 14 S., 825; affd., 3 Sh. and M'L., 127. (*s*) 1 Bell's Com., 829.

trated by cases where expenditure of money by the tenant on improvements (*f*), and advances of money or furnishings by the creditor (*g*), his suspending diligence (*h*) or liberating the principal debtor (*i*), on the faith of the informal lease or cautionary obligation, as the case may be, have been held to make it effectual. The same rule applies where a party has interposed or continued bound as cautioner on the faith of an irregular obligation by another person to secure his relief (*k*), or to join him as co-cautioner (*l*). And a verbal sale of lands, under the condition that the seller should buy up the mid-superiority, in order that the subjects might be held directly of the Crown, was sustained in favour of the seller on account of his having implemented that condition (*m*). Thus, also, where a superior promised verbally to enter gratis a party intending to purchase the property, *locus penitentiae* was held to be excluded in consequence of the party having made the purchase on the faith of the promise being fulfilled (*n*).

§ 842. But part of Professor Bell's description of the acts which constitute *rei interventus* is, that they should be "known to, and permitted by, the obligor to take place on the faith of the contract" (*o*); and in another place he observes that "the knowledge of the party, who is imperfectly bound, that the other is proceeding on the faith of the agreement, is a necessary ingredient in the plea of *rei interventus*; and this either actual knowledge, or knowledge to be implied from circumstances necessarily leading to the probability of loss without any means taken to prevent it" (*p*). This view, however, which is not supported by any other authority, and is not consistent with the decisions referred to in the preceding section, has been disregarded by the Court in a late case, where a party defending an action on an improbative guarantee in favour of a bank, followed by cash advances on the faith of it, pleaded that

(*f*) As in Murdoch *v.* Moir, 18th June 1812, F. C.—Campbell *v.* Dougall, 1813, Hume D., 861—M'Rorie *v.* M'Whirter, 18th December 1810, F. C.

(*g*) As in Manderson *v.* M'Minn, 1802, Hume D., 90—Balfour *v.* Thomson, 1806, ib., 94—Grant *v.* Johnstone, 1845, 7 D., 890—Sinclair *v.* Sinclair, 1795, Bell's Fo. Ca., 140. (*h*) Douglas *v.* Clapperton, 1809, noted in Hume D., 105—Trotter *v.* Martin, ib.—Campbell *v.* Monro, 1815, Hume D., 106. (*i*) Dunmore Coal Co. *v.* Young, 1st February 1811, F. C.—M'Neill *v.* Black, 1814, Hume D., 108.

(*k*) Brown *v.* Campbell, 1794, M., 17,058—Martin *v.* Wingate, 1828, 6 S., 859—Miller *v.* Dott, 1814, Hume D., 105—Ballantyne *v.* Carter, 1842, 4 D., 419.

(*l*) Henderson *v.* Murray, 1765, M., 16,986. (*m*) E. Kinghorn *v.* Hay, 1674, M., 8414. (*n*) Gordon *v.* L. Pitsligo, 1674, M., 8415. (*o*) Bell's Pr., § 26.

(*p*) 1 Bell's Com., 329.

there was no relevant allegation of *rei interventus*, as the pursuer did not allege that the advances had been made in the presence of the defender or with his knowledge. The Court held that an averment of knowledge was not necessary (*r*); and, as to implied knowledge, their Lordships' opinions show that none is required beyond that which exists in every case, where a party who has subscribed a writing for a certain purpose, and delivered it to the party in whose favour or on whose behalf it has been granted, with the intention and in the expectation that it should be used for that purpose, does not take steps to prevent it from being acted upon.[11]

§ 843. It has sometimes been maintained that negative acts will not create *rei interventus*. This however is erroneous (*s*). A party may be as much prejudiced by another's not acting as by his positive proceedings, while it may have been the very object of the agreement to produce such conduct. Besides, as Lord Fullerton has remarked, most negative acts may be stated positively (*t*). The only peculiarity attending them is, that as they are less easily identified, greater care should be observed in inquiring whether they arose from mere omission, or from reliance on the informal contract.

(*r*) Johnstone *v.* Grant, 1844, 6 D., 875. Lord Medwyn observed, "I confess I can discover no authority in our law for holding that actual knowledge of the advance is necessary in such a case; it being quite sufficient in my opinion that it is what he must have contemplated at the time he put his name to the writing, as it directly authorised it; and he must be presumed to know that it would be used for the purpose for which it was granted, as in fact it has been. . . . . I do not find the element of knowledge that the writing was acted on mentioned in any of our authorities, except, perhaps, the most recent one. . . . . If the agreement has been acted upon, as the granter plainly knew it was intended to be when he subscribed it, and gave it to his friend to be used by him for this very purpose, this is all that can be required to raise up a personal exception against him from pleading that it is an informal writ which he granted." Lords Moncreiff and Cockburn followed in the same strain; while Lord Justice-Clerk (Hope) limited his opinion to its not being necessary in that particular case to aver knowledge. (*s*) See Ballantyne *v.* Carter 1842, 4 D., 419. In Sutherland *v.* Hay, 1845, 8 D., 288, several of the judges thought that such negative acts of the landlord as refraining from advertising a house as unlet, and from preparing for a new lease, would bar a party who had contracted with him from resiling from an informal lease of it. (*t*) Ballantyne *v.* Carter, *supra*.

[11] The doctrine in the text, that averment of knowledge is unnecessary, was adopted in Church of England Life and Fire Assurance Co. *v.* Wink, 1857, 19 D., 414, and 1081. Advances to a principal obligant on the faith of an improbative cautionary obligation will render the obligation binding on the cautioners. But the Court will not go beyond the decided cases in sustaining the plea of *rei interventus*, "so far as founded on facts belonging to the actual completion and fulfilment of the contract;" Church of England Life and Fire Assurance Co. *v.* Wink, *supra*, per Lord Justice-Clerk (Hope)—United Mutual Mining and General Life Assurance Society, 1860, 22 D., 1185.

In the following cases negative acts were sustained. Where a verbal guarantee to see a debt paid before a certain day had been followed by delay of proceedings till then, the cautioner was held to be bound (*u*). Where a verbal caution had been interposed after a contract of sale with a solvent purchaser; and where, in consequence of the caution and of the cautioner's conduct, the seller had refrained from diligence; and in the interval the purchaser had become bankrupt; the obligation was allowed to be proved by the cautioner's oath (*x*). But, in general, merely refraining from doing diligence will not be sufficient; otherwise it might be said that every informal cautionary obligation is validated by this means (*y*). Yet, if the creditor has not merely contemplated, but has commenced to do diligence, his interruption of the inchoate proceedings will suffice to make effectual an informal cautionary obligation which was granted to him for that purpose (*z*). Thus, also, where a minister raised a summons of augmentation against the titulars of the tiends, and abandoned it on their agreeing to give him a certain amount of stipend; and where, after he had done so, the commission for planting churches expired, and did not revive until he had left the charge, in consequence of which he had been unable to raise a new action during his incumbency; the Court held that the titulars could not resile from their agreement, because matters were no longer entire (*a*). In like manner, it has been held enough to set up an informal letter of relief, that the cautioner continued bound on the faith of it (*b*). And where a tenant executed an informal renunciation of his lease, and, on his death shortly afterwards, the possession was continued, not by his heir-at-law, but by his widow and children, this, although not involving any positive act by the heir, was held to have made the renunciation effectual against him (*c*).

(*u*) Clackmannan *v.* Nisbet, 1624, 1 B. Sup., 180. See next note.

(*x*) Campbell *v.* Monro, 1815, Hume D., 106. In this case, and that in the preceding note, the Court seem to have thought that verbal caution without *rei interventus* is ineffectual, and cannot be proved even by the cautioner's oath. But this is erroneous; see § 597, *et seq.*[12] (*y*) Bell's Crs. *v.* Dunbar, 1810, noted in Dunmore Coal Co. *v.* Young, 1st Feb. 1811, F. C.—1 Bell's Com., 329, note 1. (*z*) Dunmore Coal Co. *v.* Young, *supra*—Milne *v.* Smith, 1828, 2 S., 501—Douglas *v.* Clapperton, 1809, noted in Hume D., 105—Trotter *v.* Martin, 1817, ib.—M'Neil *v.* Black, 1814, Hume D., 108. (*a*) Park *v.* University of Glasgow, 1675, M., 2535.

(*b*) Martin *v.* Wingate, 1828, 6 S., 859—Ballantyne *v.* Carter, 1842, 4 D., 419.

(*c*) Milne *v.* Forbes, 1830, 8 S., 990.

[12] But see § 601, note [4].

§ 844. Acts which constitute *rei interventus* may be proved *prout de jure*, although the antecedent obligation relates to heritage (*d*). Where the act is of such a nature that it could not be proved by parole as the sole ground of an obligation or discharge (*e.g.*, intromission with, or payment of, money), yet, if it is founded on merely as a fact of real intervention, it would rather seem that it may be proved *prout de jure* (*e*). And where the fact of payment or intromission is averred by the party who received the money, or who is liable to account for the funds intromitted with, it may be proved by parole; because the proper written evidence of such a fact is a discharge under that party's hand, delivered to the person from whom the money was received (*f*).

Where the acts founded on as *rei interventus* are proved, but the party seeking to resile denies that they took place on the faith of the informal obligation, the Court will determine the question from the relative characters and bearings of the obligation and the acts in question, with the aid of parole evidence on any kindred circumstances (*g*).

§ 845. As to the mode of proving the obligation, there is of course no difficulty where it has been embodied in an informal writing; because that, being the written constitution and measure of the contract, is the only competent evidence of its terms (*h*). Where the contract was constituted verbally, the best evidence of it is the writ of the party seeking to resile; *e.g.*, his written admission *ex post facto*, or in a sale of heritage a receipt under the hand of the seller, mentioning the sums paid as part of the stipulated price. Failing written proof, the oath of the party who attempts to resile may be resorted to. When writ is required for the constitution of an obligation while matters are entire, *rei interventus* does not open the door to proof at large of its terms; but merely obviates the want of written evidence.[13] Accordingly, verbal sales of heri-

(*d*) M'Lean *v.* Richardson, 1834, 12 S., 865—Gray *v.* Johnstone, 1838, Macf., R., 54. (*e*) See *supra*, §§ 591, 609, 610. (*f*) See *supra*, ib.

(*g*) See illustrative cases *supra*, § 827, *et seq.*; and Visc. Melville *v.* Douglas' Tr., 1830, 8 S., 841—Grant *v.* Johnstone, 1845, 7 D., 390—Procurator-Fiscal of Roxburgh *v.* Ker, 1672, M., 12,410. See Laurie *v.* Craik, 1697, M., 8425, where in an action laid upon a verbal sale of heritage and payment of the price, the Court required reference to the defender's oath not only as to the terms of the alleged contract, but also as to whether he received the money in contemplation of that bargain, or *quo alio nomine?* This was regarded as a reference of the terms of the bargain. See per Lord Fullerton in Foggo *v.* Hill, 1840, 2 D., 1384. (*h*) *Supra*, §§ 114, 179, *et seq.*

[13] The statement, that *rei interventus* obviates the want of written evidence, seems

tage and verbal obligations affecting that class of rights, when followed by *rei interventus*, may be proved by oath on reference, but not by parole (*i*).

§ 846. This is thought to be also the rule in regard to verbal leases for more than one year, followed by *rei interventus* (*k*).[14] But there are two special cases in which so strict a view was not taken. In one of them the term in an informal missive had been omitted, and the Court held that the circumstances implied it to be for the tenant's life (*l*). And in the other case, where there had been a similar omission, and the missive implied a lease for years, they allowed the tenant to prove that the landlord had intimated by proclamation at the church doors that he would grant leases for nineteen years to such of his tenants as would enlist in a certain regiment, and that the parties had afterwards verbally concluded a lease for that term, upon which the tenant had enlisted accordingly (*m*).

§ 847. Yet, although parole of the verbal contracts above referred to is inadmissible, an incomplete proof of their terms from the writ or admission on record of the party, may be eked out by proof *prout de jure* of the possession by which they have been followed. This is a corrollary to the rule mentioned above, that ambiguous expressions in deeds may be construed with the aid of the consequent usage or possession, being the parties' own exposition of their meaning (*n*). Accordingly, where a party raised action for removal of certain buildings from ground which he maintained belonged to him, and the defender pleaded that the ground had been

(*i*) Laurie *v.* Craik, 1697, M., 8425—M'Lean *v.* Richardson, 1834, 12 S., 865—Rait *v.* Galloway, 1833, ib., 131—Stewart *v.* Ferguson, 1841, 3 D., 668, per Lord Ivory (Ordinary)—*Contra*, Proc.-Fisc. of Roxburgh *v.* Ker, 1672, M., 12,410. (*k*) Neill *v.* Cassilis, 22d Nov. 1810, F. C.—M'Rorie *v.* M'Whirter, 18th Dec. 1810, F.C.—More's Notes, 67. (*l*) D. Athole *v.* Spankie, noted in Hume D., 786.

(*m*) M'Leod *v.* Urquhart, 1808, Hume D., 840. (*n*) *Supra*, § 224, *et seq.*

hardly accurate; the obligation must first be proved by the appropriate and competent evidence, and *rei interventus* does not obviate the necessity of written evidence, but merely prevents repudiation; see *supra*, § 832, note [7], and § 167, note [11]. A recent case in the House of Lords has been held not opposed to this rule; there the tenant of a mineral lease was debarred from working out a certain part of the minerals; he averred that he had got the permission of the landlord to work that part of the minerals, and alleged the landlord's acquiescence, and acts constituting *rei interventus;* and the House of Lords directed an issue, Whether the minerals were worked and removed with consent of the landlord? Wark *v.* Bargaddie Coal Co., 1856, 18 D., 772; reversed, 1859, 3 Macqueen, 467; and see *supra*, § 167, note [11].

[14] See *ante*, § 832, note [7].

transferred under a verbal contract of excambion, followed by *rei interventus;* but the pursuer, while admitting the contract, denied that it embraced the ground in issue: the Court decided the question upon the possession by which the contract had been followed, and which was of a patent and very marked character (*o*).

§ 848. Cautionary obligations and obligations of relief followed by *rei interventus* may be proved by writ or oath of party; but parole of them is inadmissible, except where they form integral parts of such verbal contracts concerning moveables, as may be proved by witnesses (*p*).[15]

§ 849. Before concluding this chapter a few remarks may be made upon earnest, arles, or *arrhae;* which is in some respects analogous to *rei interventus.* It is a sum of money or some other moveable, given by one party to the other in a verbal contract of sale, hiring, or the like, as a token that their communing has resulted in a bargain. From some texts of the civil law (*r*) it has been supposed that this formality imports that either party may resile from the contract; the one by forfeiting the earnest, and the other by restoring it, and as much more as penalty. But the opposite doctrine is more in accordance with the civil law (*s*), and has been adopted in this country, namely, that, in general, earnest is *evidentia rei* of the bargain having been completed; and that, after it has been given and received, neither party can resile by restoring or forfeiting (*t*). Lord Stair lays down broadly that giving earnest prevents the contract from being any longer a *nudum pactum;* so that, matters not being entire, neither party can resile (*u*). The decisions, however, do not warrant holding the payment of a trifling sum in name of arles to have the same effect as *rei interventus.* It has been decided that an excambion of shares in a joint stock company, which is a contract requiring writ for its constitution, was not made binding by a guinea having been given in name of earnest (*x*). And where the parties to a verbal sale of stockings

(*o*) Visc. Melville *v.* Douglas' Tr., 1830, 8 S., 841. (*p*) See the subject of this section fully noticed *supra*, §§ 599, 601, 835.

(*r*) Code, 5, 21, 17—Inst., 3, 24, Pr. (*s*) Dig., 18, 1, 35, Pr.—Code, 4, 49, 3—Ib., 4, 10, 5. (*t*) Stair, 1, 14, 8—Ersk., 3, 3, 5—Mack. Inst., 3, 3, 1—Bell's Pr., § 178 (1)—More's Notes, 95—1 Hunter on Land. and Ten., 345—2 Fraser on Pers. and Dom. Rel., 376—Brown *v.* Ly. Whittingham, 1629, M., 8468—Wallace *v.* Wishart, 1800, Hume D., 383—Topping *v.* Barr, 1830, 8 S., 973. (*u*) Stair, *supra.* (*x*) Lawson *v.* Auchinleck, 1699, M., 8402. With this case compare

[15] By the Mercantile Amendment Act all such obligations must be in writing; 19 and 20 Vict., c. 60, § 6.

stipulated that their contract should be reduced to writing, *locus penitentiae* was held not to have been excluded in consequence of a dollar having been given as arles (*y*). Earnest, therefore, does not obviate the want of written evidence in contracts which require that solemnity (*z*). It is merely a mark of concluded consent in bargains which may be validly contracted by simple verbal paction.

§ 850. But where earnest is by uniform and notorious local custom interposed in certain contracts, it becomes indispensable to their constitution (*a*). On the other hand, so much is this matter subjected to local usage, that either party may resile and forfeit the earnest money, provided that be the custom of the district (*b*). In any case, if the earnest has been returned and accepted, the bargain is held to have been departed from by mutual consent (*c*).

§ 851. When the earnest money is merely nominal in proportion to the subject of the contract (as a shilling in a sale of a box of diamonds), it is held not to be part of the price, but "dead earnest;" whereas it is computed in the settlement, if its amount is considerable (*d*).

CHAPTER V.—OF HOMOLOGATION AS OBVIATING DEFECTS IN THE AUTHENTICATION OF DEEDS.

§ 852. Defects in the authentication of deeds may be obviated by homologation. This may be defined as the assent or approval which the granter of a deed, or one to whose interest any writing or transaction is prejudicial, interpones to it by a posterior act, so as to exclude an objection which otherwise would have been competent to him (*a*). The doctrine of homologation, in so far as it

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Graham *v.* Corbet, 1708, M., 8428, where the payment of five guineas as part of the price of shares of stock was held to be substantial *rei interventus*. It had not been given expressly as arles. See also Fraser, *supra*.

(*y*) Ogilvy *v.* Smart, 1700, 4 B. Sup., 473—Ersk., 3. 3, 5—More's Notes. 95—Fraser, *supra*. (*z*) This is the proper meaning of the texts of the civil law above referred to, *supra* (*r*)—See Ersk., *supra*. (*a*) Bell's Pr., § 173 (1)—2 Fraser on Pers. and Dom. Rel., 377—See also Ker *v.* Downie, 1670, M., 8470.

(*b*) Watt *v.* Stewart, 1703, M., 8472. (*c*) 2 Fraser, 376, 7.

(*d*) Ersk., 3, 3, 5—2 Fraser, 377—Bell's Dic., *voce* "Earnest." But Lord Stair (1, 14, 3) and Sir G. Mackenzie (Inst., 3, 3, 1) lay down generally that earnest money is computed in the price. (*a*) Stair, 1, 10, 11—Ersk., 3, 3, 47—1 Bell's Com., 145—More's Notes, 67.

relates to deeds not validly executed, and some of its principles in regard to kindred matters, will now be considered.

§ 853. The granter of a deed will be barred from objecting to the execution of it, if he has held it out as genuine, or acted upon it on that footing (*b*). The cases already cited in illustrating the doctrine of *rei interventus* support this rule, wherever the acts performed on the faith of the contract were known to the party who afterwards pleaded the informality (*c*). In like manner, the objection that a marginal addition containing an essential part of a deed of conveyance was not authenticated, was held to have been removed by acts of homologation by the granter of the deed (*d*).

§ 854. Deeds executed by a person *sui juris*, but labouring under some incompetency created by positive law, may be made effectual by the homologation of the parties to whose interests they are adverse. Thus an heir-at-law will not be allowed to challenge *ex capite lecti* a deed of his ancestor, if he homologated it (*e*); and an heir of entail may be barred by homologation from challenging a preceding heir's deeds on the ground that they were in contravention of the entail (*f*). Thus, also, where a party in his will named his eldest son and heir to be his executor, and appointed him to manage certain leases of heritage, and to account for the profits to the testator's widow, under deduction of a certain sum for his own trouble; and where the heir died after having entered on the management, and accounted and drawn the remuneration during one year; and where on his death the tutor of his heir contended against the widow and younger children of the common ancestor that the leases, being heritage, could not be carried by testament; the Court held that the acts of homologation excluded that plea (*g*). In like manner homologation was held to bar the objection to a decree of adjudication, that it had passed upon an insufficient citation (*h*).

(*b*) Authorities in preceding note—Smith *v.* Bank of Scotland, 25th Jan. 1821, F. C.; affd., 2 Sh. Ap., 282 (as noticed *per curiam* in E. Fife *v.* E. Fife's Tr., 4 S., 340)—M'Dowall *v.* Wighton, 1830, 5 Mur., 106; 9 S., 12 S. C.—M'Morran *v.* Black, 1624, M., 16,830—Cow *v.* Craig, 1633, M., 16,833—Telfer *v.* Hamilton, 1735, M., 5657—Cases in More, 67, *et seq.* (*c*) *Supra*, § 840—Cases in More, *supra*.

(*d*) Bruce *v.* Bruce, 1770, M., 10,805; affd., 2 Pat. Ap. Ca., 258.

(*e*) Reg. Maj., 2, 18, 10—Ersk., 3, 8, 99—1 Bell's Com., 98—Crawford *v.* Crawford, 1683, M., 5694—Erskine *v.* Erskine, 1682, M., 5703. (*f*) Forbes *v.* Renton, 1840, 3 D., 149—Cunningham *v.* Cunningham, 1823, 2 S., 232; affd., 1 W. S., 103—See also Mackenzie *v.* Mackenzie, 1767, M., 5665. (*g*) Fordyce *v.* Fordyce, 1743, M., 5700. This is a case of approbate and reprobate, although it is not so reported. (*h*) Geddy *v.* Telfer, 1681, 2 B. Sup., 9.

Even the want of jurisdiction was obviated, where the party against whom the decree had been pronounced had homologated it (*i*). So where a submission stipulated that it should fall unless the arbiters pronounced decree within three months, and they did not do so till after two years had elapsed, the Court held that the objection had been cured by acts of homologation of the parties submitting (*k*); and a similar result followed where the objection to a decree-arbitral was that the submission had terminated *ex lege*, on account of not having been duly prorogated (*l*).

§ 855. Homologation by the party concerned in them validates obligations undertaken by a factor or agent *ultra vires mandati* (*m*); and by a person as taking burden on him for another from whom he had no mandate to act (*n*). Also the sale of a minor's heritage by his friends on his behalf was held to have been homologated by his having in majority received part of the price (*o*). It follows *a fortiori* that acts of homologation by a major will validate deeds which he granted during minority without consent of his curators (*p*); and that deeds by a woman during coverture are valid, if she homologated them in viduity (*r*). They may also be made effectual against her husband (*s*), or her heir (*t*), by homologation of these parties respectively.

§ 856. The question was once raised (*u*), Whether deeds by pupils are capable of homologation? Erskine distinguished between them and the deeds just referred to, in this respect, that while the act of a married woman creates a natural obligation, although the granter is incapable of binding herself in law; and while a minor's deed with the consent of his curators is effectual; the obligatory act of a pupil is a nonentity, because, like an idiot, he is

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(*i*) Lowrie *v.* Gibson, 1671, M., 5622; 2 B. Sup., 511, S. C. See White *v.* Spottiswood, 1846, 8 D., 952; and Livingstone *v.* Presb. of Hamilton, 1846, 8 D., 898.

(*k*) Dundee, Perth, and Aberdeen Rail. Co. *v.* Richardson, 1851, 13 D., 552.

(*l*) Fleming *v.* Wilson, 1827, 5 S., 906. (*m*) Robertson *v.* Robertson, 1831, 9 S., 865—Mackinlay *v.* Gillon, 1830, 9 S., 90—Stein's Assignees *v.* E. Mar, 1827, 6 S., 1—Robertson *v.* Baillie, 1758, 5 B. Sup., 845—Crawford *v.* Crawford, 1683, M., 5694.

(*n*) M'Naughton *v.* Murray, 1792, Bell's Octavo Ca., 258. (*o*) Linton *v.* Dundas, 1729, M., 5624. (*p*) Craig *v.* Moncrieff, 1611, M., 5711—Rires *v.* Rires, 1663, M., 5619—Home *v.* Justice-Clerk, 1671, M., 5711; 5688, S. C.—Lockhart *v.* Lockhart, 1677, 1 B. Sup., 790; 2 ib., 218, S. C.—Somervile *v.* E. Annandale, 1688, M., 5694—Ersk., 3, 3, 47—2 Fraser Pers. and Dom. Rel., 239. (*r*) Mitchell *v.* Cunningham, 1672, M., 5711—Gordon *v.* Farquhar, 1766, 5 B. Sup., 932—Ersk., *supra*—1 Fraser Pers. and Dom. Rel., 254; and Wemyss *v.* Stewart, 2d March 1778 (unreported), there cited. (*s*) Grant *v.* Baillie, 1830, 8 S, 606.

(*t*) Thomson *v.* Stewart, 1840, 2 D., 564. (*u*) Harvie *v.* Gordon, 1726, M., 5712.

naturally incapable of consent (*x*). But this view is opposed to the law laid down by Professor Bell, that homologation may give effect to deeds which would otherwise be null and in no degree binding, as well as to those which exist imperfectly and subject to exception (*y*). Erskine's doctrine is also questioned by Professor More (*z*); and it cannot be reconciled with several decisions already cited (*a*), where deeds which did not create any natural obligation on a party were held to be effectual in consequence of his homologation.

§ 857. Deeds to which the granter's subscription has been procured by means of fraud admit of being homologated (*b*), although they are as deficient in real consent as those signed during minority. Even a deed to which a party's signature has been forged may be rendered binding on him (at least in the hands of one who is not accessory to the fraud), in consequence of the party appearing to be the granter having, either expressly or by his conduct, accredited the deed as genuine (*c*).[1]

(*x*) Erak., 3, 3, 47. (*y*) 1 Bell's Com., 145—See, however, Bell's Pr., § 27. (*z*) More's Notes, 68. (*a*) *Supra*, §§ 855, 887.—See also M'Gibbon *v.* M'Gibbon, 1842, 14 D., 605. (*b*) Rigg *v.* Durward, 1776, M., 5672; M., "Fraud," Appx., No. 2, S. C.—More's Notes, 68. Can a deed extorted by force be homologated? See Thomson *v.* M. Annandale, 1829, 7 S., 305. (*c*) Provan *v.* Gray, 1821, 1 S., 92—Miller *v.* Little, 9 ib., 328—Maiklem *v.* Walker, 1833, 12 ib., 53—Findlay *v.* Currie, 1850, 13 D., 278—Reg. *v.* Parish, 1837, 8 Car. and Pa., 94—Barker *v.* Gingell, 1800, 3 Esp., 60—*Supra*, §§ 568, 671.

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[1] A deed which is null may be adopted, and if so, is good from the date of adoption; but the party maintaining that such a deed has been adopted, will probably, at least if the nullity be on account of the incapacity of the party, be required to establish the deed by a declarator. Thus, where in a reduction of a deed as (1) null because of the insanity of the granter, or (2) reducible on the ground of facility and circumvention, the pursuer took issues applicable to these grounds of reduction, the Court allowed the defender, in answer to the second issue, to take an issue, Whether the granter, when not labouring under weakness of mind and facility, homologated the deed? But they refused to grant an issue of homologation, as counter to the pursuer's issue, on the ground of insanity; because if the pursuer succeeded in that issue he nullified and destroyed the deed, and therefore there was nothing that could be homologated. But the party founding on the deed might establish by declarator that, though the granter was insane when he executed the deed, he adopted it when sane, in which case it would be set up as at the date of the adoption; but homologation of a deed impetrated by fraud validates it *ab initio;* Gall *v.* Bovil, 1855, 17 D., 1027. A bank, as holder of a bill, charged a party who, *ex facie* of the bill, was an indorser; he suspended on the ground that the indorsation was forged; the charger averred that other bills drawn by the same party, and bearing the suspender's indorsation, had been previously discounted at the bank; that intimation of these had been sent to the suspender, and that he had taken no notice of them. In these circumstances, the charger proposed to take an issue,

§ 858. It is not yet settled whether deeds vitiated by erasures or alterations *in substantialibus* are in all cases incapable of homologation. No doubt a deed of entail, labouring under such an informality, cannot be validated by this means; because, if the entailer did not execute and record a valid deed, his heirs are entitled to take the estate unfettered, and their acts cannot raise into a strict entail that which, as executed by an entailer, was null (*d*). It is also thought that if a gratuitous deed to the prejudice of the granter's creditors or his heir-at-law, contains a vitiation *in essentialibus*, the right of these parties to challenge it would not be excluded by their homologation, even where there was no ground to suspect that the alteration had been made fraudulently by the party founding on the deed (*e*).

§ 859. Again, if one who has right under a deed of any kind has fraudulently vitiated it, his possession upon it in that state, and his deriving from it benefits which the granter did not confer upon him, will not entitle him to maintain his right on the ground of homologation or acquiescence by the persons having the adverse interest; because that would be allowing him to profit by his fraud to the prejudice of parties who cannot be presumed to have known the true state of his title (*f*). Nay more, although the adverse party cannot plead ignorance of the discrepancy between the deed as executed and the subsequent possession (as where he is one of the parties to the document), his acquiescence in that possession, combined with the vitiated document, will not constitute a valid right in favour of the party who unwarrantably made the alteration; and if the right requires written proof *ex solennitate*, the homologation will not be admitted for the purpose of making the vitiated deed effectual, on the ground that the adverse party afterwards assented to its terms.

§ 860. But if a transaction which does not require writing for its constitution has been recorded in a document containing erasures or other alterations *in substantialibus*, and if that document has been

(*d*) Shepherd *v.* Grant's Tr., 1844, 6 D., 464; affd., 6 Bell's Ap. Ca., 153—Boswell *v.* Boswell, 1852, 14 D., 378. (*e*) See *per curiam* in Robertson *v.* Ogilvy's Tr., 1844, 7 D., 244—Smith *v.* Ranken, 1835, 13 S., 461; affd., 1 Rob. Ap., 173.

(*f*) Grant *v.* Murdoch, 1830, 8 S., 734; 3 De. and And., 10, S. C.; *infra*, § 872.

Whether the suspender had adopted and accredited the subscription? The issue was refused, because mere silence as to other bills, which it was not alleged the suspender had paid or had ever seen, did not amount to adoption of the bill in question; Boyd *v.* Union Bank of Scotland, 1854, 17 D., 159.

followed by mutual actings of the parties which unequivocally apply to it in its altered condition, there is some difficulty in determining whether the deed, as well as the consequent real evidence, can be received as proof of the transaction. Its admission is favoured by an old decision, which is reported in these terms—"Where a minute is null from want of witnesses, and vitiated and interlined, it is sustained as homologated by the party, in so far as he has received an assignation appointed to be made by the other party and has comprised thereon" (*g*). Nor is there any doubt that in practical life documents containing alterations in essential particulars are frequently used and acted upon in onerous transactions. But such cases raise a dilemma. If the acts of real evidence are in themselves sufficient proof of the terms of the transaction, the admission of the deed is unnecessary; whereas, if they are not sufficiently explicit, and if the vitiated deed were admitted to eke out or explain their meaning, an interpretation might thereby be put upon them which they do not warrant, and perhaps one inconsistent with that which would have been drawn from them in connection with the document as originally framed. A similar difficulty, however, exists to some extent in every case where questionable evidence is admitted. On the whole, it is thought that the writing, although altered in essential respects, may be received as exegetical of the subsequent and relative actings of the parties. This has been repeatedly done in regard to transactions *in re mercatoria*. And bills and other mercantile documents have often been sustained in their altered state, upon proof that they represented the contract really entered into between the parties (*h*). Such cases indeed, do not properly stand upon homologation of a document containing vitiations. They are rather cases of contract proved by facts and circumstances, the written record of which occupies a subsidiary place in the proof, and ought not to receive effect in any particular in which it is not fully corroborated by the real evidence.

§ 861. A distinction must also be drawn between vitiations in the body of a deed, and those which occur in the testing clause, or relate to the authentication of the deed as a whole. Homologation will obviate the latter, in the same way as it will cure the want of the statutory solemnities.

§ 862. As consent to the informal contract is essential in obli-

(*g*) Gordon *v.* Lyle, 1620, M., 17,012.

(*h*) See *infra*, § 889, *et seq.*

gations validated by *rei interventus*, so assent to it *ex post facto* is the indispensable and characteristic element in all acts which may create homologation (*i*). Consequently, one who is incapable of legal obligation cannot homologate. This is the case as to the acts of a pupil or an idiot (*k*), a woman *vestita viro* (*l*), and a minor without consent of his curators (*m*). Acts of homologation by a minor with his curator's consent were held not to create homologation of a deed granted on deathbed by the minor's ancestor, which benefitted the curators but prejudiced the minor (*n*). And although a submission entered into by a wife regarding her heritage, bearing nullities under the act 1681, c. 5, was held to have been homologated by her husband having appeared and pleaded on her behalf before the arbiters; "for the husband being administrator for his wife, his consent implies her consent" (*o*);—yet where a person on deathbed disponed his heritage to his daughter (who was his heir-at-law) and her husband in conjunct fee, whom failing to her husband's heir; and the spouses possessed on the deed jointly for many years, the heir of the daughter was held entitled to challenge it; because the daughter's possession having been under the influence of her husband, and his possession having been for his own advantage, and not in his character of administrator for his wife, their joint acts did not infer homologation (*p*). On the same principle, a deed of ratification executed by a debtor, while a process of ranking and sale of his estate was depending, and therefore after the matter had become litigious, was held not to bar the challenge of competing creditors (*r*).

§ 863. The principle, that assent is indispensable to homologation, implies that a party must be fully aware of the existence of the deed supposed to be homologated by him, and with the state of matters as affected by it (*s*). Thus, where a bond had been drawn in name of several apprisers, and subscribed by some of them, one

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(*i*) Stair, 1, 10, 11—Ersk., 3, 3, 48—1 Bell's Com., 144—See analogous cases under *rei interventus*, § 816. (*k*) Ersk., 3, 3, 47—Morton *v.* Young, 11th Feb. 1813, F. C. (*l*) Ersk., *supra*—Gray *v.* Gray, 1672, M., 3324. (*m*) Brodie *v.* Brodie, 1827, 5 S., 900—M'Gibbon *v.* M'Gibbon, 1852, 14 D., 605.

(*n*) Irvine *v.* Tait, 1808, M., "Deathbed," Appx., No. 6. (*o*) Telfer *v.* Hamilton, 1735, M., 5657. (*p*) Gray *v.* Gray, *supra*. (*r*) Harkness *v.* Graham, 1833, 11 S., 760. (*s*) Stair, 1, 10, 11—Ersk., 3, 3, 48—1 Bell's Com., 145—Ogilvie *v.* Scott, 1694, M., 5652—Stewart *v.* Baillie, 1841, 3 D., 463—Anderson *v.* Bank of Scotland, 1836, 9 Sc. Jur., 66—Shaw *v.* Shaw, 1851, 13 D., 877, and cases in following notes—See also Cochrane *v.* Black, 1855, 17 D., 321—L. Panmure *v.* Crockat. 1854, ib., 85.

who had not subscribed was held not to have homologated it by having concurred in certain legal proceedings in conformity with its tenor; there not being ground to infer that he knew of its existence (*t*). So where a party had for several years accepted the interest on certain provisions in her father's deed of settlement, she was held not to be thereby barred from claiming *legitim*, because she had all the time been ignorant of its amount (*u*). And where a widow was entitled to £1000 of *jus relictae* and £20 of terce; and her husband executed a settlement making very inferior provisions in her favour, and declaring that she was to forfeit these in the event of a second marriage; and where she and the other parties concerned, acted for several years on the footing of the deed being unchallengeable; it was held competent to her to recur to her legal rights, because any acts done by her as in homologation of the deed, having been in ignorance of these rights, could not prove her consent to surrender them (*x*). *A fortiori*, if the party founding on certain acts of an approbatory character, has improperly concealed from the other party the legal right of which the latter is supposed to have deprived himself, these acts will not infer homologation (*y*).[2]

§ 864. But where a decree of apprising bore that a certain creditor was to rank *pari passu* with the party who had raised the action, and that the latter had consented to that arrangement, and where both the creditors named in the decree concurred in a factory for drawing the rents and paying them in terms of the decree, an action of reduction which the original appriser raised of the decree, on the ground that the consent referred to had not been signed by him, was repelled on the ground of his homologation; and his plea, that "it was *ignorantia juris* that made him subscribe such a factory," was disregarded (*z*). It appears from one of the reports of this case

(*t*) Telfer *v.* Maxton, 1661, M., 5631. (*u*) Johnstone *v.* Paterson, 1825, 4 S., 234. (*x*) Hope *v.* Dickson, 1833, 12 S., 222. (*y*) Murray *v.* Murray's Tr., 1826, 4 S., 374—And see Robertson *v.* Baxter, 1821, 2 Mur., 425.

(*z*) Charters *v.* Barry, 1687, M., 5650. In Graham *v.* Jolly, 1831, 5 W. S., 297; Lord Gifford laid down broadly that in cases of homologation *ignorantia juris neminem*

[2] When homologation is pleaded by trustees against the claims of beneficiaries, or of a widow, or the heir, or children, it must be shown that the acts founded on were done by the parties in the full knowledge of their legal rights and of the value of their claims; Keith's Trustees *v.* Keith, 1857, 19 D., 1040—See also Douglas *v.* Douglas' Trustees, 1859, 21 D., 1066. Where a trustee for behoof of creditors, being an agent, made professional charges, and the truster passed his accounts,—the truster was allowed to challenge the accounts, because it was not shown that he knew that the trustee was not entitled to make professional charges; Lauder *v.* Millars, 1859, 21 D., 1353.

that the objection to the decree was the want of the party's subscription to the consent, which in point of fact he had adhibited. He was therefore under a natural obligation to fulfil the decree. In like manner, where a party really consented to a deed not formally executed by him, his subsequent acts of homologation will bar his right of challenge, and he will not be heard to plead that he did not know the legal consequences of the informality. But where a party was under no natural obligation to implement a deed, *ignorantia juris* has been regarded as a sufficient answer to the plea that he homologated it. This principle appears in the cases already mentioned, where the ground on which parties were held not to have homologated deeds containing provisions less favourable than their legal right was, that they had not been aware of the nature and extent of the latter (*a*). The same doctrine is supported by a decision where an heir-at-law, who was young and inexperienced, succeeded in challenging a deathbed deed granted by his ancestor to his prejudice, although he had executed a deed of ratification of it; the Court being satisfied that he had not been made properly aware of the legal rights which the deed of ratification bore that he had gratuitously abandoned (*b*). He had been cognizant of the fact that his ancestor's deed had been executed on deathbed, but not of his consequent legal right to take the granter's whole heritable estate unaffected by it.

The Lord Justice-Clerk Hope observed in a recent case,—"I do not think that knowledge in minority is to be held as sufficient to instruct knowledge after the minor has attained majority" (*c*).

§ 865. In one case, where a party challenged a deed on the ground that one of the instrumentary witnesses had not seen him subscribe or heard him acknowledge his subscription, and the party founding on the deed denied the alleged informality and pleaded alternatively homologation; the Court refused to allow him a counter-issue of homologation, on the ground (*inter alia*) that that would require averment and proof that the other party was aware of his legal rights before homologating; whereas there was not only no averment of such knowledge, but, on the contrary, the averment that no defects requiring homologation did exist (*d*).[3] Without

excusat. But the judgment did not involve that general question. (*a*) *Supra*, § 863. See also Stewart *v.* Baillie, 1841, 3 D., 463. (*b*) Murray *v.* Murray's Tr., 1826, 4 S., 374. (*c*) M'Gibbon *v.* M'Gibbon, 1852, 14 D., 611, per L. Just.-Cl. Hope. (*d*) Shaw *v.* Shaw, 1851, 13 D., 877.

[3] Shaw *v.* Shaw is thought not to be a case of high authority; see *supra*, § 729.

presuming to question this decision as applicable to the record in the particular case, it is thought to be clear that the pleas of informality and homologation may be put in issue alternatively (*e*). The party founding on the deed may plead—1st, it is formal, and I deny that it lies under any latent objection;—and, 2d, if it does, the other party knew of the fact (although I did not), and, with that knowledge, acted upon and homologated the deed. Nay, does not the averment of homologation imply an averment that the party homologating knew of the defect; so that express allegation of knowledge is not indispensable?

§ 866. Homologation may be either express, as by executing a deed of ratification, or implied from acts which unequivocally show that the party assented to the deed in question, and which cannot fairly be ascribed to any other purpose (*f*). What facts are sufficient to imply homologation cannot, therefore, be stated by anticipation, as each case must depend on its own special circumstances. It may be observed, however, by way of illustration, that while payment or other acts of implement usually betoken approval, yet, if they were performed by a party under the pressure of legal diligence or process, they lose their effect of inferring homologation (*g*). Nor is this in general implied from subscribing as witness to the deed under challenge, because the witnesses are not presumed to know the terms of the deed which they attest (*h*). In the case of an heir-at-law attesting his ancestor's deathbed deed, it is farther to be presumed that he did so from fear of offending the granter by refusal (*i*). But homologation was inferred where the heir-at-law had both written and attested the deathbed deed (*k*). It has also been implied from the simple act of attestation, where that indicated assent; as in cases of marriage-contracts attested by members

(*e*) See Anderson *v.* Bank of Scotland, 1836, 9 Sc. Jur., 66—Finlay *v.* Currie, 1850, 13 D., 278—Gibson *v.* Huttons, 1828, Macf. on Issues, 542—Walker *v.* Walker, 1844, ib., 545—Sim *v.* Cruikshanks, 1844, ib.—Philp *v.* Pitcairn, 1838, ib., 549.

(*f*) Stair, 1, 10, 11—Ersk., 3, 3, 48—1 Bell's Com., 145. (*g*) Stair, 1, 10, 11—Ersk., 3, 3, 48—Dunbar *v.* Vassals of Muchrome, 1662, M., 6715—Rue *v.* Houston, 1668, M., 16,484—Jack *v.* Fiddes, 1661, M., 5633; 2923, S. C.—Burnet *v.* Ewen, 1680, M., 16,494; *contra*, Bishop of Ross *v.* Fouller, 1760, 2 B. Sup., 479.

(*h*) Ersk., *supra*—1 Bell's Com., 145—Cases in M., 5629, 30; 5638; 5646; 5654.

(*i*) Dallas *v.* Paul, 1704, M., 5677—Ersk., *supra*—1 Bell's Com., 98.

(*k*) Brown *v.* Muir, 1736, M., 5624—Elch., "Deathbed," No. 6.

note [17], and remarks of Lord Ivory in M'Neillie *v.* Cowie, 1858, 20 D., 1229, 30 Scot. Jur., 727.

of the family [illegible] and a lease by a bishop witnessed by a member of the chapter [illegible]. So the Court held as equivalent to consent by a husband, his having written and attested (n), and even having simply attested his wife's deed (o).

§ 867. Of course, homologation will not be inferred from acts which took place under protest, or on a reservation of the right of challenge (p).[4]

§ 868. Homologation implied from a party's conduct has the same effect as an express deed of ratification. It confirms as a whole a deed which is indivisible; whereas, if the deed consists of independent parts, the homologation of one portion does not ratify the remainder (r). Where a deed executed on deathbed contained provisions in favour of several brothers and sisters of the heir-at-law, payments made by him to some of them have been held to infer homologation as to them all (s). But there must often be cases where the party entitled to challenge a deed in favour of several persons would be willing to abandon his objection only as to some of them: and, therefore, it is thought that circumstances which indicate his disfavour, or even his indifference, to the persons who found on acts relating to other grantees would be sufficient to limit the effect of the homologation to its immediate objects.

§ 869. Homologation, while it bars objections by the party homologating, and his representatives, does not affect third parties competing on a real right (t). Thus, the debtor's homologation of an heritable bond on which infeftment had followed, was held ineffectual to support it as a real right in competition, although sufficient to make it binding as a personal obligation (u). Lord Kil-

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(l) Davidson v. Davidson, 1714, M., 5652—Johnstone v. Berry, 1725, M., 5657—Ersk., *supra*. (m) Bishop of the Isles v. Schaw, 1631, M., 5630.

(n) Riddell v. Scott, 1728, M., 5681. (o) Hepburn v. Kirkwood, 1686, M., 5650. (p) Ersk., 3, 3, 49—1 Bell's Com., 146—Malcolm v. Barden, 1823, 2 S., 410—Crichton v. Crichton's Tr., 1826, 4 S., 553; affd., 3 W. S., 329—See Adam v. Wylie, 1832, 5 D., 391, a special case as to reservation not communicated to the party founding on the homologation. (r) Stair, 1, 10, 11—1 Bell's Com., 146.

(s) Steel v. Steel, 1774, M., 5669—Erskine v. Erskine, 1682, M., 5703; 5 B. Sup., 471. (t) Ersk., 3, 3, 49—1 Bell's Com., 146—Bogle v. Hers. of Sandyhills, 1735, M., 8409. (u) Liddle v. Dick's Crs., 1744, M., 5721; Elch., "Homologation," S. C.—See also Harkness v. Graham, 1833, 11 S., 760.

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[4] Ratification by children of their father's settlement, constituting his wife his universal legatory, was held not to bar their claim for *legitim*, because such a will carried nothing but the dead's part; White v. Finlay, 1861, 24 D., 38.

kerran, in reporting this decision, observes, that "it has never been found in any case that homologation was good in a competition." But Professor Bell considers this expression to be a "little too broad" (x). There do not seem to be any cases defining the proper limits of the rule.

§ 870. According to Mr Erskine, homologation gives the right to which it applies the same effect as if it had been valid from the beginning (y). With more discrimination the learned Professor whose opinions have been so often quoted in this chapter, lays down that "where there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first. But where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect" (z).[5] In the one event the homologation, being merely a waiver of a technical objection, draws back to the date when the contract received its essential element of consent. In the other, that was adhibited subsequently, when by homologation the party for the first time undertook the obligation.

CHAPTER VI.—OF DEEDS OBJECTED TO ON THE GROUND OF VITIATION.

§ 871. Integrity in the text is essential to the validity of every deed; and therefore alterations by deletion, superinduction, erasure, or the like, in any substantial part of it are almost always fatal, unless the testing clause shows that they were made before the deed was executed (a). The reason is, that without such notice the deed does not bear to have been authenticated in its altered state; and there is therefore no proof that the alterations were not made after execution and without the authority of the granter.

(x) 1 Bell's Com., 146, note 4. (y) Ersk., 3, 3, 49.
(z) 1 Bell's Com., 145. By this passage correct Bell's Pr., § 27.
(a) *Supra*, § 724.

[5] This statement of the law is adopted by Lord Cowan in Gall v. Bird, 1855, 17 D., 1027.

Where the alteration is by words superinduced or written on erasure the objection is twofold, namely, 1*st*, That words which were contained in the writing as executed have been obliterated; and, 2*d*, That words to which the granter did not consent have been substituted for them. Besides, the obliteration of essential parts of a deed may have been the act of the granter; and when it is not mentioned in the testing clause, there is room for supposing that it may have been made for the purpose of revocation (*b*).

It depends on the terms of each deed what are to be held alterations *in substantialibus*. The following cases illustrate the views of the Court on the point.

§ 872. The subject of a deed is *in substantialibus*. Accordingly, where a bond had manifestly been altered from a smaller to a larger sum, the Court held it to be null, and refused (*in poenum falsi*) to sustain it for the sum originally agreed to (*c*). So where in a disposition of land by a father to his second son, two lines were erased, but without superinduction, in the place where the measurement should have appeared, in an action raised by the father's heir to have it declared that the disponee's widow possessed under the deed a larger subject than had truly been conveyed, the Court, considering that the original description had been intentionally erased, restricted the widow's right of possession; and one judge (Lord Cringletie) considered "that the erasure was of such a description as to reduce the deed *in toto*. There might have been a restriction to a right of liferent" (*d*). In another case an instrument of sasine in *Coblehouse* and other lands was held null in a claim for enrolment on account of "*house*" being on erasure; the rest of the subjects not being sufficient for a qualification (*e*).

§ 873. Vitiation in the name of the grantee is also fatal. This was held where, throughout a *mortis causa* disposition, the letters *ohn* of the disponee's christian name *John* were on erasure; there being no doubt that it had originally stood *James*; and the testing clause not mentioning that the alteration had been made before subscription (*f*). And where the investiture in a deed of entail

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(*b*) See the principles on which vitiations are fatal clearly stated by Lord Chancellor Cottenham in Shepherd *v.* Grant, 1844, 6 Bell's Ap. Ca., 171; affirming, 6 D., 464.

(*c*) Lawrie *v.* Reid, 1712, M., 12,284—M'Douall *v.* Rep. of Kennedy, 1723, M., 17,068; affd., Rob. Ap., Ca., 488—Deans, 1673, 3 B. Sup., 9. (*d*) Grant *v.* Murdoch, 1830, 8 S., 734; more fully reported in 3 De. and And., 10.

(*e*) Innes *v.* E. Fife, 1827, 5 S., 559; 2 W. S., 687. This case occurred before the act 6 and 7 Will. IV (noticed *infra*, § 882), as to erasures in instruments of sasine.

(*f*) Reid *v.* Kedder, 1835, 13 S., 619; affd., 1 Rob. Ap. Ca., 183.

was to the entailer in liferent, and the heirs-male of his body in fee, "whom failing, *to the eldest son living at the time of my decease*," &c., "whom failing," to another substitute, the words in italics being written on erasure throughout the deed, it was held null as to all persons whose rights depended on the validity of the substitution so vitiated (*g*). But a vitiation in the name of one who is substituted to the heir founding on the deed, will not annul it as to the latter, because his right is independent of that of the heir whose nomination is invalid (*h*).

§ 874. Vitiations in the names of some of the trustees in a trust-deed, or some of the executors in a will, do not annul the deed, since the death or non-acceptance of these parties would not defeat the purposes of the granter (*i*). But it is doubtful whether vitiation in the names of all the trustees, or in the name of a trustee *sine quo non*, is not fatal as inferring cancellation (*k*). The names of all the executors in a will being on erasure does not, it is thought, void legacies which the will contains; since these may be validly bequeathed without nominating an executor.[1]

(*g*) Shepherd *v.* Grant, 1844, 6 D., 464; affd., 6 Bell's Ap. Ca., 153.

(*h*) Maxwell *v.* Houston, 1725, Rob. Ap. Ca., 539—Abernethie *v.* Forbes, 1835, 13 S., 263—Richardson *v.* Biggar, 1845, 8 D., 315. (*i*) E. Traquair *v.* Henderson, 1822, 1 S., 527—Robertson *v.* Ogilvie's Tr., 1844, 7 D., 236—Richardson *v.* Biggar, *supra*—Kemps *v.* Ferguson, 1802, M., 16,949. (*k*) See per Lord Fullerton in Robertson *v.* Ogilvie's Tr., *supra*. A trust-deed blank in the names of all the trustees is null; Pentland *v.* Hare, 1829, 7 S., 640.

[1] A trust-deed will receive effect although all the trustees decline, or all predecease the granter. It is clear, also, that a trust-deed will receive effect though the truster recal the nomination of all the trustees mentioned in the trust-deed, or draw his pen through their names, provided he nominate trustees in a codicil, holograph or otherwise authenticated. It has been argued that, in such cases, the heritage is not validly conveyed, because, in consequence of the recal of the nomination of the trustees in the trust-deed, there is no disponee in the dispositive clause, and the mere nomination of trustees in a codicil cannot supply the place of a *de presenti* conveyance. But that argument has been overruled, on the ground that it is fixed law that all the testamentary deeds of a deceased are to be regarded as one settlement, the basis of which is the trust-deed, if any; and that, therefore, the nomination of trustees in a codicil imports their names into the trust-deed, and brings them within the scope of the dispositive words. Where a truster deleted the names of all of his trustees in his trust-deed, and named new trustees in a holograph marginal note, signed by him, but not noticed in the testing clause, the deed was sustained. The marginal note was referred to in a holograph codicil, but the deed would, it is thought, have been sustained although there had been no such codicil; Royal Infirmary of Edinburgh *v.* Lord Advocate, 1861, 23 D., 1213. Further, if a truster recal the nomination of all his trustees, and do not nominate other trustees, there seems strong reason for holding that the deed would be sustained.

§ 875. The duration of a right is *in substantialibus*. Thus the Court annulled a lease which had been altered from three to five years (*l*); and a bond of thirlage which had been changed from a temporary to a perpetual right (*m*); and another deed of the same kind, from which there had been cut off a marginal addition limiting the obligation to the landlord's minority (*n*). So, a back letter by an absolute disponee, obliging him to reconvey before Martinmas in the year eighteen hundred and forty-eight was held null, because the word "forty" had been either superinduced or written on erasure (*o*).

§ 876. Where the prohibitory clause in a deed of entail was against selling, alienating, &c., "either *irredeemably* or under reversion," but the letters "*irred*" were on erasure, it was held to be vitiated in the essential of a prohibition against alienation, and therefore to be null as a deed of entail (*p*). The deed might originally have borne the word "redeemably" but been altered after subscription; and in a previous case (*r*) a deed of entail containing the word "redeemably" in mistake for "irredeemably" but without vitiation had been cut down. In the case of Boswell the word as

(*l*) A B, 1625, M., 16,925. (*m*) Ross *v.* Garden, 1685, 2 B. Sup., 80.
(*n*) Cunningham-head *v.* Town of Lanark, 1628, M., 12,274. (*o*) Kirkwood *v.* Patrick, 1847, 9 D., 1361. (*p*) Boswell *v.* Boswell, 1852, 14 D., 378.
(*r*) Eglinton *v.* Montgomery, 1845, 7 D., 425; affd., 6 Bell's Ap. Ca., 136.

Though they had all predeceased the truster it would be sustained; and it seems difficult to give to their recal a stronger effect. Though, perhaps, the rules of feudal conveyancing may require a *de presenti* conveyance to a disponee, it is not required that, when a trust-deed comes into operation by the death of the truster, there should be a *de presenti* conveyance to any existing disponee. It seems sufficient that there was a trust-disponee originally, though he may have died before the deed was effectual; the provisions to the beneficiaries having been made in a deed complete when it was made, it is thought that the mere recal of the trust machinery would not affect the provisions in their favour; Lord Curriehill (Ordinary) in MacKilligin *v.* MacKilligin, *infra*. The deletion of the names of all the trustees would appear to put the deed in the same position as if the nomination of trustees had been recalled, or as if they had all died; and, therefore, it is thought consistent with authority and principle to hold that the deletion of the names of all the trustees is not a vitiation of the trust-deed *in substantialibus*. It may be open to doubt whether a trust-deed in which no trustees are named will, in all cases, be regarded as null; or whether the beneficiaries may not be regarded as the true disponees; Lord Mackenzie in Ogilvie *v.* Robertson, *supra*—Lord Ivory in Royal Infirmary of Edinburgh *v.* Lord Advocate, 23 D., 1222. A trust conveyance of moveables without a trustee or executor would be effectual. In Pentland *v.* Hare, referred to in the text, the deed which was not sustained was, when it was signed, blank, not only in the names of the trustees, but also in all the more important purposes of the trust; Robertson *v.* Ogilvie's Trustees, 1844, 7 D., 236—MacKilligin *v.* MacKilligin, 1855, 18 D., 83—Royal Infirmary of Edinburgh *v.* Lord Advocate, 1861, 23 D., 1213.

superinduced coincided with the whole object and tenor of the deed; and there could not be the shadow of a doubt that the vitiation arose from no other cause than chirographical mistake. A decision equally against real justice, but following from the rigid rules which have been adopted in this class of cases, was pronounced shortly afterwards. In a deed of entail, framed and recorded for the purpose of preventing alienation and alteration in the order of succession, the prohibition on the latter head commenced with the words "That it shall not be lawful to or in the power of any of my said disponees," &c., but the words *not be lawful* were on erasure, and the testing clause did not mention the fact. A minute examination showed traces of several letters which had originally occupied the space, and which would have suited the words "be lawful to." The Court were not much impressed with the faint remains of the original words; but having no doubt that the erasure occurred *in substantialibus* of the deed, they were reluctantly constrained by the previous authorities to hold the deed to be null (*s*). It is not surprising that more than one eminent judge, in deciding this case and the previous case of Boswell, should have regretted that the law, as settled by a long train of decisions, left them no alternative but to reduce the deeds in which such errors occurred. In particular, Lord Rutherfurd in the case of Fraser, following Lord Fullerton's opinion in Boswell's case, observed "that there were decisions which pointed at other principles; and which, concurring with sound legal principles, would have led to the adoption of what would have been a much safer rule for the safety of the lieges. The matter has come to such a height that it requires, for the safety of the country, immediate statutory interference."[2]

(*s*) Fraser *v.* Fraser, 1854, 16 D., 863.

[2] In a recent case where an entail was challenged, the law of erasures was thus laid down,—"An erasure not mentioned in the testing clause is presumed to have been made after subscription, and the letters or words written on erasure are not authenticated," . . . . and "are held not to have been written. If the letters written on such an erasure are essential to the word, the word is held not to be there. If the word is essential to the clause, the clause is held not to be there. If the clause is essential to the deed, the deed is null and void." In the prohibition to innovate or alter the order of succession, the word *to* and letters *inn* were written on an erasure; this erasure was held not a vitiation, because the word innovate was not essential to the clause; but in the clause declaring void the "deeds of the said J. G., or of any of the said heirs or substitutes of tailzie" made in contravention of the entail, the words *or of any of* were on an erasure; and there the word *any* was held by the majority of the Court essential to the universality of the irritancy, and therefore to the entail. Lord Benholme held, that in dealing with erasures in entails, not only were the words

§ 877. A bond granted under a condition which had been obliterated was found to be ineffectual, although there was no ground for suspecting fraud, as the obliteration had probably been caused by age or damp (*t*). In like manner, it was held fatal to a bond that half a line near the term of payment had been obliterated (*u*); and a disposition in which two lines in the clause setting forth the onerous consideration were deleted, but still legible, was reduced in an action at the instance of a creditor of the granter (*x*).

§ 878. Where the name of one of the instrumentary witnesses to a deed was written on erasure in the testing clause, and the word "witness" added to his subscription was in another person's handwriting, the deed was held to be null (*y*).

§ 879. In contrast with these cases it has been held not to create nullity that certain words or letters are on erasure, where the sense of the deed would not be affected by holding them *pro non scriptis*, or substituting for them any other words which could reasonably be supposed to have occupied the space covered by the vitiation. Thus, where the words *pages of* were on erasure, in a testing clause bearing that the deed was "written on this and the twelve preceding *pages of* paper," the deed was sustained (*z*). This was also the case where the testing clause of a deed written on thirteen pages set forth that it was "on this and the *twelve* preceding pages," and the letters *ve* were on erasure (*a*); and where the testing clause of a deed bore to be written "on this and the *six* preceding pages," but the letter *x* was written on erasure (*b*). In like manner, it was held not to impair a charter of confirmation that in the narrative of one of the sasines confirmed, the date of which was described as "*tertio die Junii annoque presenti*," the last of these words was written on erasure; and the plea that the word had originally been written *praedict* was overrulled, because there was no doubt as to the identity of the sasine intended to be confirmed, the remainder of the description of which was accurate (*c*).

(*t*) E. Bute *v.* Halyburton, 1712, M., 11,545. (*u*) Pitullo *v.* Forrester, 1671, M., 11,536; 12,281, S. C. (*x*) Brown *v.* Herries, 1701, M., 11,541.

(*y*) Gibson *v.* Walker, 16th June 1809, F. C.; affd., 2 Dow, 270.

(*z*) Morrison *v.* Nisbet, 1827, 7 S., 810. (*a*) Gaywood *v.* M'Eand, 1828, 6 S., 991. (*b*) E. Cassilis *v.* Kennedy, 1831, 9 S., 663.

(*c*) Adam *v.* Drummond, 12th June 1810, F. C.

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on the erasure to be held not those originally written there, but it was to be supposed that the words originally there were different, and such as would invalidate the clause; Gollan *v.* Gollan, 1862, 24 D., 1410.

§ 880. Alteration in the date of a deed, which is not an essential part, is not in general fatal (*d*). But if it was made fraudulently in order to defeat an objection of deathbed, or to give an undue preference in a competition of creditors, it would seem that the deed will not be effectual as of its proper date in the hands of the person who vitiated it (*e*).

§ 881. A deed executed without any vitiation may have been altered fraudulently by one who either pleads the alteration as a ground of nullity, or maintains the deed in its changed state. This, like any other fraud, may be proved *prout de jure* by the opposite party who founds on the deed as it originally stood (*f*). But the mere possibility of such an event will not save from nullity a deed which is vitiated *in substantialibus* (*g*).

The rules as to holograph alterations on deeds have been noticed already (*h*).

§ 882. At common law vitiations *in substantialibus* of instruments of sasine and resignation are fatal, although the instrument should be recorded in its altered form. But this has been partly remedied by statute (*i*) in so far as regards instruments of sasine and resignation *ad remanentiam* (not being *propriis manibus*), which contain words on erasure. The instruments in which sasine or resignation *propriis manibus* are set forth, being really dispositions of heritable right, are nullified by vitiation in any substantial part.[3]

(*d*) Bayne *v.* Caivie, 1673, M., 11,540—Arrot *v.* Gairden, 1730, M., 12,285—*Supra*, § 714. (*e*) Merry *v.* Howie, 1801; affd., 17th March 1806, M., "Writ," App., No. 3—See *supra*, § 715, where a doubt is suggested as to whether the decisions in support of this rule are well founded. (*f*) See Cunningham-head *v.* Town of Lanark, 1628, M., 12,274—Hunter *v.* Peter's Crs., 1670, M., 1687.

(*g*) See this well brought out in Boswell *v.* Boswell, *supra*, 14 D., 878.

(*h*) *Supra*, § 755. (*i*) 6 and 7 Will. IV, c. 33.

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[3] Recent statutes render instruments of sasine and instruments of resignation *ad remanentiam* unnecessary; and it is now competent to register, instead of the instruments, the conveyance or the procuratory along with a warrant of registration, as provided in the statutes,—or a notarial instrument in the statutory form; 21 and 22 Vict., c. 76, §§ 1, 4; and 23 and 24 Vict., c. 143, § 3. The provisions of the act 6 and 7 Will. IV, c. 33, that no challenge of an instrument of sasine or of resignation on the ground of erasure shall receive effect, unless it is averred and proved that such erasure has been made for the purpose of fraud, or that the record is not conformable to the instrument as presented for registration, are extended to notarial instruments and instruments of resignation *ad remanentiam* in the forms authorised by the act 21 and 22 Vict., c. 76; and to instruments of cognition and notarial instruments under the act 23 and 24 Vict., c. 143; and to notarial instruments under the Heritable Securities Act 8 and 9 Vict.,

§ 883. Where a deed contains distinct and independent members or subjects, vitiation in one of them will not make it null as to the others. Thus, one legacy in a will may subsist although another falls (*k*);[4] and, as already observed, legacies may be validly constituted by a will which is null in the nomination of an executor (*l*); and vitiations in one of the substitutions in a series of heirs will not affect heirs whose names occur before the vitiated portion (*m*). Thus, also, where the names of some of the lands in an heritable bond were on erasure, the security was sustained as to the rest (*n*). And an instrument of sasine, vitiated and falsified as to one of the subjects contained in it, was held effectual as regarded the others in favour of a disponee who had not been concerned in the vitiation (*o*). But wherever the rights of the parties to a deed depend on its being sustained as a whole, vitiation in one branch of it will be fatal to the others also;—as, for example, where a lease with a *cumulo* rent, or a feu-contract with a *cumulo* feu-duty, for several portions of land is vitiated in one of the subjects. Even where the rent or feu-duty is apportioned among the different subjects contained in the deed, vitiation in regard to one of them will be fatal to the whole deed unless it appear that the parties intended the several members of it to stand independently. For example, the tenant in a large farm, the rents for different portions of which are separately specified, may have considered the sum laid upon one part to be too high, but to be compensated by better terms as to the others; and, if there was no such inequality, he must be presumed to have made his offer with the view of cultivating the whole

(*k*) Per Lord Chancellor in Grant *v.* Shepherd, 1844, 6 Bell's Ap. Ca., 153.

(*l*) *Supra*, § 874. (*m*) *Supra*, § 878. (*n*) Howden *v.* Ferrier, 1836, 13 S., 1097. With this case compare Innes *v.* E. Fife, 1827, 5 S., 559; affd., 2 W. S., 637; noticed *supra*, § 872. (*o*) Keir *v.* Pardowie, 1597, M., 17,062.

c. 31. These provisions do not apply to instruments of sasine, or of resignation *propriis manibus*, or where the conveyance or procuratory is itself registered. In case of error or defect in any of the instruments, procuratories, or conveyances recorded under these acts, it is competent to record them anew; 23 and 24 Vict., c. 143, § 35.

[4] An erasure in a codicil does not necessarily vitiate the codicil if the clause on the erasure be separable from the rest of the deed; the Court are not entitled to presume that the words originally written on the erasure were words which would have invalidated the codicil or any bequest in it. It has been thought, however, that an erasure in a deed of entail is in a different position, and that the party challenging the entail is entitled to assume that the words originally in the erasure were such as would destroy the deed as an entail; Peddie *v.* Doigs, 1857, 19 D., 820—Gollan *v.* Gollan, 1862, 14 D., 1410.—See also Earl of Buchan *v.* Scottish Widows' Fund Society, 1857, 19 D., 556.

farm, and finding employment for a certain stock of horses and farm implements, as well as for his own time and capital. It may, therefore, be very fairly supposed that he would not have agreed to a lease of a part of the farm;—or, at least, that he would not have contracted on the footing of an abatement of rent corresponding merely to the number of acres, to which some vitiation in the lease may immediately apply. Accordingly, the validity of such a lease as a whole, being one of the main considerations on which the tenant agreed to its terms, is an essential element in the contract, and it cannot be treated as if the different portions of the farm had been contained in separate leases.

§ 884. The proper, and in general the only competent, way by which alterations in substantial parts of deeds can be validated is by being mentioned in the testing clause in such a manner as to show that they were made before the deed was executed (*p*). In a case already noticed, a disposition *mortis causa* bore to be in favour of *John* Kedder, the granter's son, but the letters *ohn* were written on erasure throughout the body of the deed wherever the name occurred, and in one place the name was followed by the word "junior" which did not apply to John Kedder. The testing clause stated that "these presents written," &c., "are subscribed by me in favour of the said John Kedder, my son," &c.; but it did not mention that his name was written on erasure before the deed was signed. The deed was held null both in the Court of Session and House of Lords; the Lord Chancellor observing that the testing clause "did not go at all to prove that when the deed was executed John was substituted for James." It was equally consistent with the terms of that clause to suppose that the deed had been executed as in favour of James Kedder; and that, either from a change of purpose in the granter or in order to correct an error of the conveyancer, it had been altered in the interval between its execution and the completion of the testing clause (*r*).

§ 885. Alterations in the testing clause itself are more favourably treated. As that part of a deed may be filled up any time before the document is produced in judgment, so before that step has been taken the testing clause may be corrected by erasure, superinduction, or the like, and mentioning the alteration as having been made in order to correct an error. Such an *ex post facto* addition

(*p*) See *supra*, § 724.

(*r*) Reid *v.* Kedder, 1835, 13 S., 619; aff'd., 1840, 1 Rob. Ap. Ca., 183.

to the deed is effectual, and is held (by a legal fiction) to be authenticated by the subscriptions of the party and witnesses (*s*).

§ 886. In some very special cases deeds have been sustained, notwithstanding material alterations which were not mentioned in the testing clause. Where one of the parties to a marriage-contract, which was signed in duplicate, objected that the copy in the other party's hands bore a marginal addition not duly authenticated, the Court sustained the deed, because the copy of it produced by the party objecting contained the same addition (*t*). And in a celebrated case, where three several deeds mutually referring to each other were all executed in duplicate on the same day, the testing clause in each deed referring to the simultaneous execution of its double, and *vice versa;* and where throughout the deeds a great number of words were written on erasures, but no vitiation *in substantialibus* occurred in the same place in both duplicates of any one deed; the Court sustained all the deeds, on the ground that each pair of duplicates might be read together, so as between them to make up a valid deed; and the House of Lords affirmed the judgment (*u*).

§ 887. Deeds have also been sustained where words *in substantialibus* written on erasure in some places, were repeated without vitiation in other parts of the deed (*x*). But there are conflicting cases of not less authority (*y*); and it is difficult to see how the mention of an essential word in one place will remove the objection that it is written on erasure in another place where it is required in order to make the deed effectual; since, if a word of a different meaning were substituted for it, the deed would be incomplete in so far as the vitiated clause is concerned. In the cases of Boswell and Fraser, already mentioned (*z*), there could be no doubt that the alteration was completely in unison with the context, as well as with the manifest purpose of the deed. It would, therefore, seem that even where a word substituted *ex hypothesi* for

(*s*) See cases cited *supra*, § 727. (*t*) Boswal *v.* Boswal, 1708, M., 17,025—See also Smith *v.* Duke of Gordon, 1701, M., 16,987—Cubbison *v.* Cubbison, 1716, M., 16,988. (*u*) E. Strathmore *v.* E. Strathmore's Tr., 1837, 15 S., 449; affd., 1 Rob. Ap. Ca., 189. (*x*) Wright *v.* M'Leod, 1672, M., 11,540—Lyon *v.* E. Aboyne, 1709, M., 11,544—Cumming *v.* Kennedy, 1709, M., 11,542 (affd. on another point, Rob. Ap. Ca., 19)—Gordon *v.* E. Fife, 1827, 5 S., 550 (questioned by Lord Brougham in Hoggan *v.* Ranken, 1840, 1 Rob. Ap. Ca., 173)—Howden *v.* Ferrier, 1835, 13 S., 1097—See also Dyce *v.* Paterson, 1846, 9 D., 310—Wood *v.* Ker, 1838, 1 D., 14.

(*y*) Hoggan *v.* Ranken, *supra*—Reid *v.* Kedder, *supra*, § 884—Cowan *v.* Watt, 1829, 7 S., 553—See Taylor *v.* Malcolm, 1829, ib., 547—Sharpe *v.* Stevenson, 1849, 12 D., 327—Cooper *v.* his Crs., 1833, 11 S., 896. (*z*) *Supra*, § 876.

the word appearing in the alteration would be grossly inconsistent with the rest of the deed, and would render it nugatory, yet, if it could reasonably be supposed that such a word occupied the space, the deed must be dealt with on that footing.[5]

No weight can now be attached to some older decisions, where the Court gave effect to presumptions and probabilities as to the alterations having been made before execution (*a*).

§ 888. It is settled law that parole evidence is inadmissible to prove that alterations which are not specified in the testing clause were made before the deed was subscribed (*b*). This follows from the rule (*c*) that if the authenticity of a deed is not a patent fact attested in terms of the statutes, it cannot be proved by extrinsic evidence. If alterations by marginal addition, interlineation, or the like, not being mentioned in the testing clause, are alleged to be holograph, that must be proved (*d*); as well as the dates of the alterations if these are material to the cause (*e*).

§ 889. The rules regarding *vitiations in bills of exchange and promissory-notes* are in some respects peculiar. On this account, as well as from their importance, they require a detailed examination.

These documents, if altered in any material part after being issued, and without consent of the parties, are null both at common law and under the stamp acts (*f*). But alterations made before issuing, and with consent of the parties, are not fatal to the bill or note as a document of debt (*g*); although in general they destroy it as a warrant for summary diligence.

§ 890. Erasure or deletion of the subscription of one acceptor or obligant in a bill or note annuls the document as to the others; because each only undertook to be bound on the footing of having

(*a*) Oliphant *v.* Peebles, 1629, M., 11,535—Lockhart *v.* Hamilton, 1760, M., 16,939—Scrimzeour *v.* Betson, 1705, M., 11,542. (*b*) Pittullo *v.* Forrester, 1671, M., 11,536; 12,281, S. C.—Walker *v.* Gibson, 16th June 1809, F. C.; affd., 2 Dow, 270—Reid *v.* Kedder, 1835, 13 S., 619; affd., 1 Rob. Ap., 188—Shepherd *v.* Grant, 1844, 6 D., 464; affd., 6 Bell's Ap. Ca., 153—Boswell *v.* Boswell, 1852, 14 D., 878.

(*c*) *Supra*, § 812, *et seq.* (*d*) See *supra*, § 755. Will this apply to a marginal addition or the like, bearing a statement that it is in the party's handwriting? See § 754.[6] (*e*) See *supra*, § 755. (*f*) 1 Bell's Com., 391—Cases in following notes. (*g*) Bell's Com., ib.—Cases *infra*.

[5] It is thought that this principle, if admissible at all, can receive effect in regard to deeds of entail only; *supra*, § 876, note [2]; and § 888, note [4].

[6] See Anderson *v.* Gill, 1858, House of Lords, 3 Macqueen, 180,—*Supra*, 754, note [3].

proportional relief from his co-obligants (*h*). For the same reason, deleting the name of one of several drawers frees the others from their obligation (*i*). Deletion of the name of the person who stood drawer when the bill was completed and issued, and substituting a new drawer in his place, annuls a bill under the stamp laws, as it alters the contract (*k*). But where, after a bill had been completed and put into the circle, an intending indorsee wrote his name by mistake on the face of the document, and the notary deleted the subscription and filled up the indorsation with the holder's name, the Court sustained the bill even as a warrant for summary diligence (*l*). Where a bill addressed to A. and J. Dougal and Company as acceptors, and bearing that signature, was challenged by them on the ground that they had signed A. and J. Dougal, under which firm alone they traded, and that the words "and Company" had been unwarrantably added *ex post facto*, the Court sustained the bill as a warrant for summary diligence; being satisfied from its appearance that the words objected to had been written *unico contextu* with the rest of the subscription, and holding that as the objectors had confessedly accepted the bill addressed to them as A. and J. Dougal and Company, they must be considered as having adopted that firm in regard to the bill (*m*). The addition of a second obligant in a promissory-note, and a second acceptor in a bill, after the documents had been issued, was held a fatal objection under the stamp laws, as it altered the obligation to which the stamp applied (*n*). And altering the name of one indorsee frees all subsequent indorsees, because it destroys their recourse; but if it was done *in bona fide* for the purpose of correcting a mistake, it does not destroy the bill in the hands of the indorsee as a ground of action, although summary diligence is incompetent on it (*o*).

§ 891. It has been held not to destroy a bill as a warrant for summary diligence, that the words "conjointly and severally" had been added to the address to two co-acceptors; since their subscrip-

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(*h*) M'Ewan *v.* Graham, 1833, 12 S., 110. Here the Court, satisfied by inspection that a name had been erased below that of one appearing as sole acceptor, assoilzied in an action against him. (*i*) Callender *v.* Kilpatrick and Others, 10th Dec. 1812, F. C.; Hume D., 70 S. C.—*Supra*, § 801. (*k*) Fleming *v.* Scott, 1828, 2 S., 446—Young's Tr. *v.* Paisley Bank and Scott (same case), 1831, 9 S., 574—*Contra*, Lumsden *v.* Marr, 1806, Hume D., 55—*Supra*, § 801. (*l*) Russell *v.* Mill, 1810, Hume D., 63—See also Grieve *v.* Miller, 1817, noted ib., 68.

(*m*) Dougals *v.* Robin, 1828, 6 S., 504. (*n*) Home *v.* Purves, 1836, 14 S., 898—Thomson on Bills, 77—*Contra*, M'Ara *v.* Watson, 1828, 2 S., 360.

(*o*) M'Ara *v.* Watson, *supra*.

tions without the addition bound each of them *in solidum* (*p*). But where a bill had been originally accepted by one party, "as cautioner," and had been altered by erasure into "jointly and severally," the Court assoilzied the party who had subscribed as cautioner, the action having been raised by one who acquired the bill five years after it had become due (*r*). The addition to a bill of erroneous addresses to the names of indorsees, was held not to destroy recourse against them, or prevent the bill from being a warrant for summary diligence (*s*).

§ 892. Any alteration by way of increase on the sum in a bill or note is fatal to the document as a warrant for summary diligence; and unless it was consented to before issuing, it also destroys the bill or note as a ground of action (*t*). But an alteration to a smaller sum seems not to be a ground of challenge by one profiting by the change, which could not have been made for the purpose of defrauding him (*u*). The omission of the word "pounds," where it is evidently implied, does not prevent summary diligence on a bill (*x*).[7]

§ 893. Where a bill altered from a smaller to a larger sum has come into the hands of a *bona fide* indorsee for value, the question,

(*p*) Gordon *v.* Sutherland, 1761, M., 14,677—But see Chitty on Bills, 183.

(*r*) Robertson *v.* Annan, 1825, 4 S., 40. (*s*) King *v.* Crichton, 1841, 4 D., 62; affd., 2 Bell's Ap. Ca., 81. (*t*) Thus in M'Cubbin *v.* Turnbull, 1850, 12 D., 1123, a bill for £54, 19, having *teen* in *nineteen* added in different ink and handwriting, was held not to instruct a claim to vote for the trustee in a sequestration. In Ker *v.* M'Ewan, 1845, 7 D., 400; where the sum was on erasure, the holder was allowed to prove that the alteration had been consented to before issuing, the question arising in a claim to rank for a dividend in a sequestration. In Leith *v.* Elphinston, 1734, Elch., "Writ," No. 1; the alteration in the creditor's handwriting from "merks" to "pounds" annulled the bill. Query, Is alteration of the figures stating the sum a vitiation, when the sum in words in the body of the bill is correct? Lord Mackenzie (Ordinary) held it was not in M'Ewan *v.* Graham, 1833, 12 S., 110. (*u*) Laidlaw *v.* Park, 1774, M., 16,941. (*x*) Gordon *v.* Sloss, 1848, 10 D., 11,29—Phipps *v.* Tanner, 1833, 5 Ca. and Payne, 488.

[7] Where there is a discrepancy between the figures on a bill or bank cheque and the statement of its amount in words in the body of the bill or cheque, the words only are to be regarded; and so, where a bank cheque, when issued and indorsed, bore in words to be for "One hundred and sixty pounds," but in figures bore to be for "£164," and the words were afterwards altered to "One hundred and sixty-four pounds," the Court refused all action on the draft by the indorsee against the indorser; and the averment of the indorsee, that the alteration had been made to correct a mistake, was held irrelevant in the absence of an averment that the alteration had been made with the indorser's consent. Had both averments been made and established, the action would have been sustained; Edinburgh and Glasgow Bank *v.* Samson, 1858, 20 D., 1246.

who must bear the consequences of the vitiation, depends on whether ordinary attention would have discovered or suspected that the bill had been altered. If it would, the loss will fall on the indorsee; because he incurred a risk which one using ordinary business accuracy would have avoided (*y*). But if the bill has no suspicious appearance by crowding, difference in colour of inks, in handwriting, or the like, the acceptor will be liable for the full amount (*z*). "This proceeds, not on the principle of mandate, but on the obligation to indemnify loss occasioned by fault or negligence; the fault or negligence being a good answer to the plea of interpolation" (*a*). In two of the cases where the vitiation was apparent, charges on the bill were sustained to the extent of the original sums, because these were judicially admitted to be due (*b*). But it seems more correct to suspend the charge altogether, and even to assoilzie the defender in an action laid exclusively on the bill, without prejudice to an action for the debt, in which the bill would be an adminicle of evidence (*c*).[8]

§ 894. Unauthorised alteration *ex post facto* in the date of a bill is fatal; because it changes the dates of payment and prescription, and makes a new document, for which a new stamp is requisite (*d*). And it is not necessary to prove a fraudulent purpose in altering, as that will be presumed until disproved (*e*). These rules hold whether the bill is payable on demand (*f*), or at a certain period after date (*g*). When the vitiation is manifest, the

(*y*) 1 Bell's Com., 390—Graham *v.* Gillespie, 1795, M., 1458 (next note)—M'Lean *v.* Morrison, 1834, 12 S., 613—Watson *v.* Thomson, 1798, Hume D., 42.

(*z*) Bell's Com., *supra*—So held in Pagan *v.* Wylie, 1793, M., 1660, as to a bill accepted for *eight*, changed into *eighty-four*, pounds without crowding. In Grahame *v.* Gillespie, *supra*, two bills for £50 and £58, 10s., respectively, had each been altered after acceptance, by prefixing the words "*four hundred and*" to the sum in the body of the bill, and the figure 4 to the sum in the margin. The one bill not being crowded or suspicious looking, was sustained for the full sum. But as the other "had a very crowded appearance," it was sustained only for the original sum, which was admitted to be due. "The Court at the same time determined several other cases on the same grounds." See also Young *v.* Grote, 1827, 4 Bing., 253.

(*a*) Bell's Com., *supra*. (*b*) Watson *v.* Thomson, *supra*—Grahame *v.* Gillespie, *supra*. (*c*) See M'Lean *v.* Morrison, 1834, 12 S., 613.

(*d*) As in Mitchell *v.* Stewart, 1819, Hume D., 78, where the alteration was to a single day later. See also Taylor *v.* M'Whinnie, 1805, Hume D., 51—Miller *v.* Royal Bank, 1835, 13 S., 813—and cases in following notes. (*e*) Murchie *v.* Macfarlane, 1796, M., 1458; 16,946, S. C. (*f*) M'Kostie *v.* Halley, 1850, 12 D., 124; 816. (*g*) Murchie *v.* Macfarlane, *supra*—Taylor *v.* M'Whinnie, *supra*—Corrie *v.* Edinburgh and Glasgow Bank *v.* Samson, 1858, 20 D., 1246, *supra*, § 892, note [7].

Court at once refuse action, or suspend diligence, on the bill (*h*). When it is not apparent, they sometimes remit to engravers, and suspend on the investigation showing that it exists (*i*); or if the averment is offered to be established instantly, they may allow a proof. If the bill appears to be unaltered, and the allegations against it are vague, the Court will refuse the suspension, or only suspend on caution (*k*).

§ 895. But a bill altered in the date before being issued, and by consent of the parties to it, is effectual as a ground of action, the party founding on it having to prove the facts as to the alteration (*l*). The document, however, not being probative, seems not to be a warrant for summary diligence (*m*); yet, if the party suspending the diligence consents, the proof as to the alteration having been consented to before issuing may be allowed in the suspension (*n*). In one case (the authority of which may be doubted) suspension of diligence on a bill altered in the date was refused, although the Court were satisfied from the circumstances disclosed that the alteration had been made before the bill was issued (*o*).

It seems to be incompetent to turn the charge on the altered bill into a libel (*p*).

Where one of two acceptors altered the date of a bill from Candlemas to Lammas (postponing it by several months), whereupon it was signed by him, by the drawer, and by the other acceptor; in an action against the latter for payment of its contents, the Judge-Admiral assoilzied "in respect of the vitiation appearing on the face of the bill, independent of the other very suspicious circumstances of the case;" and the Court of Session sustained his judg-

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Barbour, 1825, 4 S., 228—Whitehead *v.* Henderson, 1836, 14 S., 544—Armstrong *v.* Wilson, 1842, 4 D., 1847. (*h*) Murchie *v.* Macfarlane, *supra* (*e*)—Allan *v.* Young, 1800, M., Appx., "Bills," No. 10. See also Hamilton *v.* Monteith, 1824, 3 S., 345 (new ed.). (*i*) See Hamilton *v.* Kinnear, 1825, 4 S., 102.

(*k*) Stewart *v.* Bird, 1822, 2 S. (new ed.), 10—See Dobie *v.* Stevenson, 1823, 2 S., 358. (*l*) Fairweather *v.* Alison, 12th February 1817, F. C.—Sutherland *v.* Morrison, 1822, 1 S., 526; same parties, 2 S., 442—Dobie *v.* Stevenson, *supra*—Whitehead *v.* Henderson, 1836, 14 S., 544—Armstrong *v.* Wilson, 1842, 4 D., 1847—See Miller *v.* Royal Bank, 1835, 13 S., 818—M'Millan *v.* Stewart, 1815, Hume D., 924—Cases in following notes. (*m*) M'Kostie *v.* Halley, 1850, 12 D., 816—Corrie *v.* Barbour, 1825, 4 S., 228—M'Ara *v.* Watson, 1823, 2 S. (new ed.), 318—M'Kay *v.* Robertson, 1832, 10 S., 813. (*n*) Armstrong *v.* Wilson, *supra*—See also Sutherland *v.* Morrison, *supra*, and M'Ara *v.* Watson, 1822, 1 S. (new ed.), 237, 2 S. (ib.), 318.

(*o*) Taylor *v.* M'Whinnie, 1805, Hume D., 51. (*p*) See M'Ara *v.* Watson, *supra*—Forrest *v.* Thomson, 1834, 12 S., 726.

ment (*r*). It is inconsistent with the decisions noticed above; and in Professor Bell's opinion may admit of reconsideration (*s*).

§ 896. Where the date of an indorsation had been torn off, and where it appeared from a registered protest to have been such as to raise suspicion regarding the indorsee's onerosity and *bona fides*, the Court suspended summary diligence which he had raised upon the bill (*t*).

§ 897. Alteration of the term of payment of a bill is fatal (*u*). But if it was consented to by the parties when the bill was made, the document will be a good ground for action (*x*).

§ 898. Adding a place of payment to a general acceptance (*y*), and substituting a different place of payment (*z*), are fatal to the bill, unless they were consented to before it was issued (*a*). And a claim to vote for the trustee in a sequestration, where the debt was described as due by bill, was rejected, because the words "in London" in the lithographed part of the bill (which was regular in other respects) were deleted. The Lord Justice-Clerk Hope, however, "could not say that the bill would not be a good document for claiming to rank upon in the division of the bankrupt's assets" (*b*).

§ 899. In a bill bearing to be "for value in trust account," the addition of the words "for Mr Pentland" was held not to be fatal, as they completed the writing in accordance with the fact (*c*). And where, in a bill bearing to be "for value in account for business," the last two words were said to have been added without the acceptor's consent, the Court sustained a charge on the bill, because it

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(*r*) Bryce *v.* Dickson, 16th November 1810, F. C. (*s*) 1 Bell's Com., 392.

(*t*) Kennedy *v.* Cameron, 1823, 2 S., 192. (*u*) Hamilton *v.* Kinnear, 1825, 4 S., 102—See Rodgers & Co. *v.* Murdoch, Robertson & Co., 26th December 1801 (House of Lords), 2 De. and And., 341—1 Bell's Com., 391—Glen on Bills, 99.

(*x*) Henderson *v.* Hay, 1802, M., 17,059. In Douglas *v.* Young, 1799, Hume D., 51, note, such a bill was sustained as a warrant for diligence. But this decision would probably not be followed. (*y*) Cowie *v.* Halsall, 1821, 4 Barn. and Ald., 197—1 Bell's Com., 392—Chitty on Bills, 182. (*z*) Tidmarsh *v.* Grover, 1813, 1 Maule and Sel., 734—Bell, ib. (*a*) 1 Bell's Com., 392. In Beattie *v.* Haliburton, 1823, 2 S. (new ed.), 199, action by the indorsee was sustained against the drawer of a bill payable at the "Leith Company's Bank, Dalkeith," the word *Leith* being on erasure. There was only another bank in the place, and the bill was not said to have been originally payable there. But the decision went on the narrowest majority. (*b*) M'Cubbin *v.* Turnbull, 1850, 12 D., 1123. (*c*) Commercial Bank *v.* Paton, 1837, 15 S., 1202. This was in an action by the discounting bank against an indorser.

was genuine *ex facie*, and the evidence offered to prove the objection was inadmissible; but they delivered no opinion on the relevancy of the objection (*d*).[9]

§ 900. In an English case, a promissory-note, which, in order to correct a mistake and make it in accordance with the agreement of the parties, had, before being signed or issued, been altered into a bill, was sustained as a bill (*e*). The case is quoted by Professor Bell (*f*) in support of the same rule in this country.

CHAPTER VII.—OF DEEDS MUTILATED FOR THE PURPOSE OF CANCELLATION.

§ 901. In treating of vitiations *in substantialibus*, it was observed (*a*) that one of the grounds on which they are fatal is, that they may have been made by the granter purposely, with the view of cancelling or revoking his deed. That purpose is more strongly marked by mutilating a document as a whole;—for example, by tearing it in pieces, or by cutting away the subscription or some important part of it.

This mode of cancellation requires, 1st, a final intention to revoke; and, 2d, an overt act calculated to carry out such an intention—the one element distinguishing intentional from accidental

(*d*) M'Kenzie *v.* Brit. Linen Co., 29th November 1825, F. C., 4 S., 231, S. C.
(*e*) Webber *v.* Maddocks, 1811, 3 Camp., 1. (*f*) 1 Bell's Com., 892.
(*a*) *Supra*, § 871.

[9] The act 19 and 20 Vict., c. 25, provides that where across a draft on a banker, payable to bearer, or to order, on demand, there is written or printed the name of any banker, or the words "and company," the bill shall be payable only to or through some banker; and the act 21 and 22 Vict., c. 79, provides (§ 1) that where such a draft is issued, so crossed, the crossing shall be deemed a material part of the draft, and shall not be altered except to the effect specially allowed by the act; and if the draft be crossed with a banker's name, the banker on whom the draft is drawn shall not pay the draft to any other than that banker; (§ 2) that the holder of such a cheque uncrossed may cross it with the name of a banker, or with the words "and company," or if it be issued crossed with the words "and company," he may add the name of a banker; and these crossings have the same effect as if they were on the bill when it was issued; (§ 3) persons altering such drafts with intent to defraud are guilty of felony; (§ 4) bankers are not liable under the act if the crossing be not distinct.

mutilation; the other marking actual and completed, as distinguished from intended or inchoate revocation.

§ 902. Both of these characteristics occurred in the following cases:—Where a Scotchman, who had long resided in India, executed a will, concluding "in testimony of this being my last will and testament I hereto set my hand and seal;" and the document was found in his repositories with the part to which the seal had evidently been affixed cut (not torn) off; the House of Lords held the deed to be cancelled, because the testator had (besides the usual solemnities) prescribed a seal as necessary to the authentication of his will; and his cancellation of that mark of concluded purpose indicated his intention that the document should not receive effect as his deed (*b*). So, where one who was prejudiced by a will found in the deceased's repositories, torn in two pieces, raised an action to have it declared that the will was null and void, the Court directed the party founding on it to bring an action of proving its tenor, in order to account for the mutilation; and the case was soon afterwards given up by him (*c*). In another case the Court suspended summary diligence on a bill, which had been found in the repositories of the deceased drawer torn in three pieces, and had been pasted together by his representatives (*d*). The real evidence afforded by the mutilation in these cases raised the inference that the act had been deliberate and of purpose; and it threw on the party founding on the deed the burden of proving some other intention than that of revocation. The same result followed in a case where a disposition by a wife settling her heritable estates on certain persons was found in her hands cancelled, and where she alleged that it had been cancelled accidentally, but this was not proved; while her not having judicially ratified the deed strengthened the probabilities against its subsistence (*e*).[1]

(*b*) Nasmyth *v.* Hare, 1821, 1 Sh. Ap. Ca., 65, reversing; noted *supra*, §§ 744, 773. The deed also bore markings in pencil and red ink, which showed an altered intention. A similar case occurred in America; Avery *v.* Pixley, 1808, 4 Massachussets R., 462.

(*c*) Dow *v.* Dow, 1848, 10 D., 1465. See also Forbes *v.* Sinclair, 1613, M., 11,535.

(*d*) Thomson *v.* Bell, 1850, 12 D., 1184. (*e*) Houston *v.* Shaw, 1711, Rob. Ap., 552; 561. The lady sought to set up the deed, because it was the onerous consideration on which a bond of annuity had been granted by her husband in her favour.

[1] So in an action of proving the tenor of a mutual disposition and settlement of a husband and wife, brought by a party who had an eventual interest under the deed, it was proved that the deed had been duly executed, but that when the husband predeceased, it was found that the name of the widow and of the instrumentary witnesses

§ 903. In contrast with these cases, the following illustrate the absence of one or other of the essential elements of cancellation. Where a bill payable to the drawer was found in his pocket-book after his death, torn in two pieces, but apparently in consequence of having been worn at the fold, the Court sustained it as a ground of action by his representatives against the acceptor (*f*). In a case of proving the tenor of a bond granted by a principal and cautioners, the subscription of the former had been almost entirely torn away; and the defender, while he admitted that the deed had been duly subscribed, contended that it had afterwards been cancelled; but as the bond had been recorded in the books of the county register, the Court held the tenor of it as a valid deed to be proved, because it was to be presumed that the mutilation arose from careless keeping or accident after registration, and not that the keeper of the register recorded as valid a deed mutilated in the signature of the principal obligant (*g*). Again, in an English case, where a testator, angry with one of his devisees, began to tear his will in order to destroy it, and after having torn it into four pieces was prevented by a bystander from mutilating it farther, whereupon he put the pieces together, and said "it is good it is no worse, and no material part has been injured;" the Court, holding that the act of cancellation had not been completed when the testator changed his purpose, sustained the torn document as a will (*h*). In like manner, a deed will be held effectual where the mutilation of it occurred during the party's insanity (*i*);[2] and where it was done by a depo-

(*f*) Irvine *v.* Lang, 1850, 2 D., 804. (*g*) M'Dowal *v.* M'Ghie, 1713, 5 B. Sup., 98. (*h*) Doe d. Perkes *v.* Perkes, 1820, 2 B. and Ald., 489.

(*i*) Lang *v.* Bruce, 1838, 1 D., 59. The proof of insanity failed in this case.

(there being only two) had been deleted;—and the widow deponed that she, without her husband's knowledge, had deleted her own name and that of the witnesses in a fit of passion against a person having an interest under the deed, that she afterwards regretted what she had done, and wrote again the names of herself and the witnesses in order to restore the deed; the Court held that the presumption was, that the deed had been destroyed by the husband or with his sanction; and that the unsupported testimony of the widow to the contrary was not sufficient to overcome that presumption; Winchester *v.* Smith, 1863, 1 Macph., 685. In a recent English case, it was held that when a will is found mutilated on the death of the testator, the presumption is, that it has been mutilated by the testator for the purpose of cancellation after its execution, and if there is a codicil, after the execution of the codicil; but the manner of the mutilation may show that only a partial cancellation was intended; Christmas *v.* Whinyates, 1862, 32 L. J. Prob., 73. And the presumption may be displaced by evidence; Patten *v.* Poulton, 1858, Swab. and Trist. Prob., vol. i, p. 55.

[2] In an English case, where, after a will had been duly executed, the granter became insane, and at his death the will was found to be torn; the party impeaching

sitary acting under a mistake as to the granter's intention (*k*), or without sufficient authority to cancel (*l*).

§ 904. It is held in England that when a deed is executed in duplicate, it may be cancelled by mutilation of the copy in the hands of the party, provided his intention to revoke be clear (*m*). The intention may be elucidated by parole evidence (*n*).

§ 905. Farther, a deed will be held as constructively cancelled, where the party intended to cancel it, and used means appropriate to that end, but where without his knowledge or against his will his purpose was frustrated by some other person. This is well illustrated by an English case, where a testator rumpled up his will and threw it into the fire, after tearing a part of it almost off; and where a bystander, without his knowledge, prevented it from being consumed. The revocation was held to be complete (*o*). In another case, a wife had executed a *mortis causa* deed in favour of her husband, and delivered it to him. Shortly before her death she required him to return it; and he laid it upon her pillow. She then sent for her brother to consult him as to altering or cancelling the deed. On his arrival it was amissing; and she immediately charged her husband with having abstracted it. He refused to give it into her brother's hands; whereupon she became violently excited, and fainted, and shortly afterwards died. The Court held the deed to be annulled; because the granter's intention to reconsider it, with a view to revocation or alteration, had been defeated by the party who afterwards founded on it as subsisting (*p*). The absence of proof of a concluded purpose to revoke was thus supplied by that party's wrongful act, on the maxim *omnia presumuntur contra spoliatorem;* and the case became like one in which such a purpose had been frustrated by a cause beyond the granter's control. In another case, a bond of provision was held to have been revoked,

(*k*) Cunningham *v.* Mowat's Tr., 1851, 13 D., 1376. See also Walker *v.* Ronald, 1670, 2 B. Sup., 146; 476. (*l*) See Maxwell *v.* Maxwell, 1675, M., 12,322—Forbes *v.* Culloden, 1712, M., 13,286—Carse *v.* Kennedy, 1714, M., 13,247—Fisher *v.* Smith, 1771, M., 9366—Logan *v.* Logans, 1823, 2 S., 253—Falconer *v.* Stephen, 1848, 11 D., 220; 1338. These cases are noticed fully in the chapter on the delivery of deeds. (*m*) Burtenshaw *v.* Gilbert, 1774, 1 Cowper, 49—Onions *v.* Tyrer, 1716, P. Will., 346—Pemberton *v.* Pemberton, 1817, 13 Ves., 310—Compared with Mason *v.* Limbrey, mentioned per Mansfield in 4 Burr., 2515. (*n*) Per Mansfield in Burtenshaw *v.* Gilbert, *supra.* (*o*) Bibb *v.* Thomas, 1749, 2 W. Blackst., 1043.

(*p*) Buchanan *v.* Paterson, 1704, M., 15,932.

the will was required to prove that it had been torn while the granter was sane; Harris *v.* Berrall, 1858, Swab. and Trist. Prob., 153.

where the granter had on deathbed desired his wife to cancel or burn it, but she had neglected to do so (*r*). And such directions, if clear, are relevant to infer cancellation, although, as seen in a subsequent chapter, it is usually a difficult matter to prove them (*s*). Of course a mere inchoate intention to revoke, when frustrated by accident, or by some cause not attributable to the wrongful interference of the party favoured by the deed, will not infer cancellation (*t*).

§ 906. In general, cancelling a deed produces the same effect as if the deed had never existed. But the Court have looked at a cancelled codicil in interpreting terms used in the trust-deed to which it referred (*u*). And where a person had *in liege poustie* executed a deed, laying certain burdens on her heir-at-law; which deed was found cancelled by the subscription being torn from two of the pages; in a reduction by the heir of a subsequent deed in similar terms, but extending the period for paying the sums provided in the first deed, the Court held that the existence of the first deed, although cancelled, excluded the heir's reduction. The *ratio decidendi* was, that as the first deed had been cancelled on the footing of the second, which was more favourable to the heir, being effectual, he had not suffered lesion by the granting of the second deed (*x*). The judgment, however, was pronounced on the opinions of a bare majority of four to three judges; and as it altered the interlocutor of the Lord Ordinary, it cannot be regarded as authoritative. In a subsequent case the question was debated, but not determined, whether a testament, which revoked all former ones, having been burnt by the testator, could be revived to the effect of operating a revocation of a previous testament (*y*). The Court considered that, in the absence of any farther indication of the de-

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(*r*) Chisholm *v.* Chisholm, 1673, M., 12,320. (*s*) See the sections on deeds delivered by the granter to a third person as custodier, § 960, *et seq.*

(*t*) Walker *v.* Steele, 1825, 4 S., 823. Here a testator, two or three days before her death, desired her agent to return her will in order that it might be cancelled; but he delayed to do so without any intention to defeat her purpose, and she died in the interval. The Court regarded this as merely an intention to revoke, which, for all that appeared, might have been afterwards abandoned. (*u*) Adv.-Gen. *v.* Smith (in Exchequer), 1852, 14 D., 585. See *contra*, Hughes *v.* Turner, 1835, 3 My. and Kee., 696. (*x*) Mure *v.* Mure, 1st June 1813, F. C. The first deed had been cancelled by the granter's agent, acting (as he deponed) by her directions. This decision is supported by Onions *v.* Tyrer, 1716, 1 P. Will., 345, where the cancellation of one will in the supposition that another in similar terms was validly executed, which it was not, was held not to let in the heir-at-law. See also per L. Mansfield in Burtenshaw *v.* Gilbert, 1774, 1 Cowp., 52. (*y*) Howden *v.* Howden, 8th July 1815, F. C.

ceased's intentions, the deed which had been destroyed must be regarded as if it had never been. This is the rule in England (z).[3]

The subject of this chapter is resumed in noticing actions of proving the tenor of mutilated deeds, and the delivery of deeds to a depositary with directions from the granter as to disposing of them.

CHAPTER VIII.—OF THE IMPROBATION OF DEEDS WHICH ARE PROBATIVE *EX FACIE*.

§ 907. The solemnities for the authentication of deeds are designed for securing genuine subscription, by throwing obstacles in the way of forgery, and furnishing means for detecting it. But as a deed apparently complete in the subscription of the party and witnesses, and bearing a formal testing clause, may be fabricated, or may want the essentials of a legal attestation, the question remains, By what means may such frauds and irregularities be discovered? The rule on the point is, that while a deed formal *ex facie* is probative in a high degree, it will be reduced upon proof, direct or indirect, that the subscriptions of the party or witnesses are forged, or that the witnesses did not know the granter, or did not see him subscribe, or hear him acknowledge his subscription.

§ 908. In all such cases the most direct evidence is that of the attesting witnesses. They are therefore always admissible (a); but when the objection is that they attested without knowing the party or having the subscription written or acknowledged in their presence, they may decline answering; because the case involves a criminal charge against them as accessories to forgery (b).

(z) Goodright v. Glazier, 1770, 4 Burr, 2512—Harwood v. Goodright, 1774, 1 Cowp., 92. (a) Ersk., 4, 4, 70; Bell on Testing Deeds, 235; cases in following notes. In Frank v. Frank, 1793, M., 16,822; affd., 15 Fac. Col. (folio), 753, it is said to have "been the uniform practice to examine instrumentary witnesses, and the objection goes only to their credibility." (b) Frank v. Frank, *supra*—Cleland v. Cleland, 1837, 1 D., 254. See the chapter on questions which witnesses may decline to answer, § 2016, *et seq.*

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[3] The English cases quoted were decided prior to the English act 7 Will. IV, and 1 Vict., c. 26, the 22d section of which provides that no will or codicil which has been revoked, shall be revived, except by re-execution of it, or by a codicil. In a recent case, where a will, which revoked all previous wills, was, when last seen, in the testator's possession, but could not be found at his death; the Court presumed that he had destroyed it *animo cancellandi*, and held that he had died intestate; Brown v. Brown, 1858, 8 Ellis and Blackb., 876.

§ 909. The weight due to their testimony varies with the grounds of reduction and the circumstances of each case.

If they deny their supposed signatures, the jury must determine the question of forgery of these, or mistake in identity of the witnesses, upon the whole evidence in the case; which does not necessarily involve any imputation on the witnesses' credibility (*c*).

§ 910. Where they depone that the subscriptions are theirs, but do not recollect (without expressly denying) that they saw the granter sign, or heard him acknowledge his subscription, the deed will be sustained; because the crime of falsely attesting is not to be presumed, and because the attestations of the witnesses are much more trustworthy evidence than their subsequent non-recollection, especially if they were in the practice of frequently attesting deeds, and if the question occurs several years after the date of the deed (*d*). The presiding judge will therefore direct the jury in point of law that it is insufficient to cut down the deed that one or both of the instrumentary witnesses depone "*non memini*" (*e*).

§ 911. There is much more difficulty where the witnesses admit their signatures, but state distinctly that they did not see the granter sign, or hear him acknowledge his subscription. In such cases either the attestations were culpably false, or the witnesses when examined misstate the fact intentionally, or from want of re-

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(*c*) See Commissary of Glasgow *v.* Nimmo, 1673, M., 12,661—Henderson *v.* Monteith, 1678, M., 11,552; 12,669; 3 B. Sup., 242, S. C. In Tennant *v.* Tennant, 1675, M., 12,667, where a person supposed to be one of the witnesses denied the subscription, there was another person of the same name; and the Court refused to reduce the deed, as that person had not been examined. See a somewhat similar point in Stewart *v.* Kirkhill, 1672, M., 12,654. See also Settons *v.* Settons, 1816, 1 Mur., 9, where the witness did not sign, but touched the pen of another person signing for her, in consequence of which the deed was reduced.

(*d*) See Bell on Testing Deeds, 272—Sim *v.* Donaldson, 1708, M., 16,713; 16,891 —Young *v.* Glen, 1770, M., 16,905; Hailes, 364, S. C.—Irving *v.* Maxwell, 1705, 4 B. Sup., 627 —Frank *v.* Frank, 1793, M., 16,822, *supra*—Per Lord Gifford in Smith *v.* Bank of Scotland, 1824, 2 Sh. App., 287, affirming, 25th January 1821, F. C.—See also (before the act 1681) Stewart *v.* Kirkhill, 1672, M., 12,654. In Buchanan *v.* Buchanan, 1810, Buch. Rep., 88, a testamentary writing bearing to be holograph and attested by two witnesses, but without statutory solemnities, was challenged as forged. One of the witnesses had died, the other (a writer's clerk in the habit of witnessing deeds) believed the signature to be his, but could give no account of the attestation, of which he had not any recollection. The Lord Justice-Clerk (Charles Hope), in delivering the judgment of the Court (p. 105), said that this was little more than the testimony of one man to the handwriting of another. The other evidence against the authenticity was very strong; and the document was reduced.

(*e*) Per Lord Cockburn in Anderson *v.* Bank of Scotland, 1836, 9 S. Jur., 53—Donaldson *v.* Stewart, 1842, 4 D., 1215, per Lord Justice-Clerk Hope.

collection. Every such witness is open to grave suspicion; his testimony should be sifted and weighed with the greatest care, and should be disregarded unless with the other evidence it produces a clear conviction that the deed is falsely attested (*f*). It is, there-

(*f*) In Smith *v.* Bank of Scotland, 1824, 2 Sh. App. Ca., 287, affirming, 25th June 1821, F. C., Lord Gifford observed—The instrumentary witnesses, "if they are competent witnesses, are to have their evidence looked at with the greatest suspicion; and your Lordships ought to be fully satisfied not only by their evidence, but by corroborative proof. It ought to be most overwhelming evidence before your Lordships attend to such testimony." One of the witnesses had died; the other admitted his subscription, but said he had not seen the granter sign, or heard him acknowledge his signature. His Lordship therefore thought the Court of Session were justified in saying they would "rather give credit to the witness' subscription at the time, than to his testimony at the expiration of so many (fifteen or sixteen) years, and after the death of the other witness, who might have contradicted him." In Curruthers *v.* Graham, 1790, Bell's Octavo Ca., 265, where one of the attesting witnesses swore that the deed signed was different from that which had been read over to the granter, Lord Eskgrove said, "I cannot give credit to the allegation on the credit of one admitting he was art and part in the deceit." In Anderson *v.* Bank of Scotland, 1836, 9 Sc. Jur., 63, Lord Cockburn charged the jury—"If the instrumentary witness denies having seen the granter subscribe, he convicts himself of a crime of a heinous nature; and he is therefore placed in a situation in which, if he is entitled to an iota of credit, certainly no one witness could ever possibly be entitled to less. In so far, therefore, as his testimony goes, no Court in the universe would attach any weight to it. In order, therefore, to make him credible, he must be corroborated; and the question is, has he been corroborated?" After noticing that the corroborating evidence was exceedingly weak, his Lordship added, "I deduct the evidence of Ferries, the instrumentary witness, as almost wholly worthless." It is thought that this learned judge took too strong a view against the witness; and that the following charges of the Lord Chief-Commissioner (Adam) are more correct. In Harkness *v.* Harkness, 1821, 2 Mur., 561, that learned judge charged the jury that the evidence of witnesses against their attestations "must be narrowly examined, and weighed in the nicest scales." In M'Dougal *v.* Wighton, 1830, 5 Mur., 115, his Lordship observed, more copiously, "in Lord Fife's case, Lord Eldon says their evidence ought to be sifted and attended to with care and suspicion. Lord Mansfield says, he would receive such a witness, but tell the jury not to believe him; and Lord Kenyon adopted the same view. It appears to me that Lord Eldon's is the soundest view. We admit the witness, because the objection goes to his credit, but it is for the jury to weigh it in scrupulous scales." In his charge in Fife *v.* Fife's Trustees, 1825, 3 Mur., 505, also, the Lord Chief-Commissioner expressed, but not at such length, his preference for Lord Eldon's opinion to those of Lords Mansfield and Kenyon. So, in Aitchison *v.* Patrick, 1836, 15 S., 360, in a challenge of an execution, Lord Justice-Clerk Boyle charged the jury that "the messenger's evidence in contradiction of his own writ must be scrupulously considered." In Cleland *v.* Cleland, 1838, 1 D., 254, in a motion by the challenger of the deed for a new trial, on the ground that the jury found for the deed, although both instrumentary witnesses contradicted their attestations, Lord Corehouse said "I must deal with the statement of each of these witnesses as one emitted by a man not *omni exceptione major;* but, on the contrary, labouring under very grave suspicion." His Lordship quoted from Mr Tait's work (p. 138) the following passage, which he conceived to be accurate and well founded,—"The evidence of witnesses in

fore, the duty of the presiding judge to direct the jury that the evidence is of this questionable character (*g*).[1]

§ 912. Where the instrumentary witnesses merely depone that the granter's hand was led, they do not necessarily contradict their attestations, because they may have believed such a subscription to be regular. In a case of this kind (*h*) Lord Meadowbank directed the jury that such a witness came before them "under peculiar circumstances," and that it would be for them to consider how far the whole circumstances touching his position ought to be held as affecting his credibility.

§ 913. Before civil causes came to be tried by jury, the Court repeatedly cut down deeds, where both of the instrumentary witnesses contradicted their attestations, and their evidence was corroborated (*i*). But where one witness deponed negative, and the other "did not remember the parties signing or acknowledging their subscriptions," and "thought he could say decidedly" that they did not do so in his presence, the Court refused to reduce the

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such circumstances must always be received with caution and suspicion, more especially if their depositions on oath shall directly contradict the assertion of the testing clause under their hand; but the point at issue in each case resolves itself ultimately into a question of the credibility of testimony, for the consideration of a jury or a judge to whom it may be submitted." At the same time, there is a good deal of truth in Lord Gillies' remarks in this case of Cleland, that witnesses "do not know that they commit a great offence by attesting a deed, if they neither see the granter sign nor hear him acknowledge his subscription." "It is notorious that the witnesses generally are ignorant of the law, and sign as they are bid, without either inquiry or explanation." Accordingly, his Lordship did not think their evidence against their attestations to be "liable to so much suspicion as many of our judges have affixed to it."[1]

(*g*) Cases in preceding note. (*h*) M'Dowall *v.* Wighton, 1838, Macf. Rep., 142. (*i*) See, for example, the following cases, Forbes *v.* Reid, 1698, 4 B. Sup., 404—Allan *v.* M'Kean, 1803, Hume D., 914—Young *v.* Ritchie, 1761, M., 17,047—Miller *v.* Bothwell, 1671, M., 12,319—Welsh *v.* Welsh, 1794, Bell's Octavo Ca., 44—Allan *v.* Blair, 1684, M., 13,942; 2 B. Sup., 58, S. C.

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[1] In a recent case the Lord Justice-Clerk (Inglis) seemed to entertain the opinion—quoted in note (*f*)—expressed by Lord Gillies on this point; Morrison *v.* Maclean's Trustees, 1862, 24 D., 629. Lord Cowan adopted the views of Lord Corehouse in Cleland *v.* Cleland; Morrison *v.* Maclean's Trustees, 1863, 1 Macph., 304. In this case testamentary deeds were challenged on the ground that the instrumentary witnesses did not see the testator subscribe, or hear him acknowledge his signature. The jury sustained the deeds; and the Court, on a motion for a new trial, held that when a jury, disbelieving the uncorroborated testimony of instrumentary witnesses who deponed that they did not see the granter sign or hear him acknowledge his signature, sustain the deed, the Court will not grant a new trial, on the ground that the jury should have believed these witnesses.

deed, which was not alleged to be forged (*k*). The deed was almost always sustained where one of the witnesses deponed against his attestation, and the other was dead (*l*), or not adduced (*m*). *A fortiori*, this was done where the second witness supported the deed (*n*), or where the repudiating witness was contradicted by other evidence (*o*).

§ 914. These principles seem to have been disregarded in an old decision (*p*), where the deed—a will, rational in its bequests—had been executed notarially. Both of the notaries and the four instrumentary witnesses swore to having heard the deed read over, the notaries stating, also, that the deceased said she was pleased with it. The notaries and a bystander distinctly deponed that authority to sign had been given by the testator, both verbally and by touching the notaries' pens; and one of the instrumentary witnesses saw her deliver the pen to the notaries, but, having been some distance from the bed where she lay, did not hear her speak. The other three witnesses heard the notaries ask the deceased if she could write; and they put their names to the deed, believing it to be her testament; but they distinctly swore that they did not hear her answer the notaries' question, or hear or see her give them authority to sign, either verbally or by touching their pens. There was also proof of her having afterwards spoken of the document as her will. On the whole evidence the Court reduced the will. "It was observed on the bench *non deficit jus sed probatio*. In the case of notaries the greatest strictness ought to be observed, and they ought not to be allowed to dispense with any part of the forms." The author of several learned treatises on conveyancing (*r*) seriously questions this decision, and states that he "was authorised by the opinions of the Court to say it was ill decided"; and that, if it had been properly argued, the result would have been different.

(*k*) Condie *v.* Buchan, 1823, 2 S., 432. See, in support of this view, opinions in Cleland *v.* Cleland, 1838, 1 D., 254. (*l*) Sibbald *v.* Sibbald, 1776, M., 16,906—Gibson *v.* Kennedy, 1813, Hume D., 150—Bell on Testing Deeds, 273. See *contra*, Stevenson *v.* Stevenson, 1682, M., 16,886, which is very meagerly reported.

(*m*) See Stewart *v.* Kirkhill, 1672, M., 12,654—Tennant *v.* Tennant, 1675, M., 12,667, noticed above, § 909 (*c*). (*n*) Henderson *v.* Monteith, 1678, M., 11,552; 12,669; 3 B. Sup., 242, S. C. But see Commissary of Glasgow *v.* Nimmo, 1673, M., 12,661, where the Court in the special circumstances held the deed null, but assoilzied from the conclusion of forgery. There was other evidence. (*o*) Henderson *v.* Monteith, *supra*—Frank *v.* Frank, *supra* (*a*)—Bell on Testing Deeds, 272—Farmers *v.* Myles, 1760, M., 16,849. See also Richardson *v.* Newton, 28th Feb. 1811, F. C.

(*p*) Farmers *v.* Myles, 25th June 1760, F. C., and session papers (Arniston Coll., vol. 5, No. 12, Advocates' Library). (*r*) Bell on Testing Deeds, 241, 244.

§ 915. Dead witnesses are presumed to depone in support of their attestations; but this ought not to be held as a full contradiction of a surviving witness who depones negative (*s*).

§ 916. When the case occurs before a jury (*t*), if the only evidence against the deed is one of the instrumentary witnesses, the presiding judge will have to direct the jury in point of law to find the objections not proved; because the evidence of one witness uncorroborated, is, in point of law, insufficient proof on any issue (*u*). Where there is corroborating evidence, or where both instrumentary witnesses depone against the deed, the case will go to the jury under a direction as to the credibility of the witnesses and the circumstances of the case (*x*).[2]

§ 917. As such questions usually require a balancing of doubtful and contradictory evidence, in which a great deal depends on the appearance and manner of the witnesses examined, and on general impressions of credibility which cannot be conveyed by a written proof, they are more likely to be correctly decided by a jury, or by a judge hearing the evidence in person, than by the Court reading depositions taken on commission, or printed notes of evidence led at a trial. Accordingly, if the proof is sufficient in point of law to entitle the jury to entertain it, their verdict will stand, unless on

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(*s*) Ersk., 4, 4, 70; remarking on Stair, 4, 20, 23. (*t*) In the Court of Session such cases usually go to a jury. In inferior courts (where they seldom occur) a record is made up on the point by articles improbatory and approbatory.

(*u*) Cleland *v.* Cleland, 1837 (1st trial), 15 S., 1246. From this case it appears that if the judge, while directing the jury that they may find against the deed, provided they believe the evidence of one of the witnesses deponing against it, does not also point out the necessity for that evidence being corroborated in their judgment, the Court will grant a new trial; because the judge's charge left the jury to find against the deed on the evidence of one witness uncorroborated.

(*x*) In Harkness *v.* Harkness, 1821, 2 Mur., 558, where the proof against the deed consisted of one instrumentary witness corroborated by facts and circumstances, the jury found that the signature was not genuine. In Cleland *v.* Cleland (2d trial), 1838, 1 D., 254, both witnesses deponed against the deed, yet the verdict sustained it. In E. Fife *v.* E. Fife's Trs., 1825, 3 Mur., 504; 4 S., 335; affd., 2 W. S., 166; where both witnesses deponed that one of them had not seen the granter subscribe or heard him acknowledge his subscription, and their evidence was corroborated by circumstances, the verdict was against the deed, which had unquestionably been signed by the granter. In Graham *v.* Johnstone, 1838, Macf. R., 140, also, the jury gave effect to the witnesses' depositions which were corroborated by evidence of handwriting adduced to support an allegation of forgery.

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[2] Morrison *v.* Maclean's Trustees, *supra*, § 911, note [1].

a motion for a new trial the Court consider it to be clearly against evidence (*y*).

§ 918. Besides the direct evidence which has thus been noticed, proof in improbation of deeds usually embraces evidence of handwriting. This may be derived either (1*st*) from witnesses who have become familiar with the handwriting of the person alleged to have written or signed the deed; or (2*d*) from comparison of that document with his genuine writings,—such comparison being made by the judge or jury trying the case, or by skilled witnesses examined before them.

§ 919. The first of these kinds of proof is competent in all causes, civil (*z*) or criminal (*a*), where the genuineness of a document is in issue; and for the obvious reason, that every educated and intelligent person can recognise with more or less confidence specimens of handwriting with which he is familiar. Most people can thus not only identify writings with marked peculiarities, but can recognise those less manifest characteristics which distinguish one person's handwriting from others which resemble it, and from forgeries. Imitations of handwritings, indeed, rarely escape detection by an eye which is familiar with the party's autograph; for they usually bear marks of constraint, of having been written in fragments, and been repeatedly gone over or "painted," which contrast with the freedom and fluency of genuine writings. This identification of handwriting does not arise from a critical examination of the individual letters, but rather from a general impression derived from the writing as a whole. It resembles the recognition of a friend from a momentary glance at his face, without precisely observing his features (*b*); and it is subject, in even a greater measure, to degrees of trustworthiness and risk of mistake. Its value, therefore, varies with the intelligence of the witnesses, and their opportunities for having become familiar with the genuine handwriting of the individual concerned. And as illness, strange dress, or unusual attitude, and the like, cause mistakes in identifying an individual; so a bad pen, or rough paper, a shaking hand, hurry, and many other

(*y*) So held in Cleland *v.* Cleland, *supra*, where the jury in the second trial found in favour of the deed, and the Court refused a motion for a third trial; although the first jury (15 S., 1246) had found against the deed upon weaker proof of improbation.

(*z*) Stair, 4, 20, 24—Ersk., 4, 4, 71—Tait., Ev., 143. (*a*) 2 Hume, 395—Burnett, 560. (*b*) This remark has been often made, as in Paul *v.* Harper, 1832, 10 S., 491, per Lord Chief Commissioner; and in Turnbull *v.* Doods, 1844, 6 D., 902, per Lord Mackenzie.

things, change the appearance of a person's handwriting. There are also resemblances in handwritings, especially among pupils of the same writing-master, and clerks trained in the same office; as there are likenesses among members of the same family, and occasionally between persons not related.

§ 920. Much caution and discrimination, therefore, is required in weighing this kind of evidence. It ought never to be regarded as full proof for the Crown in criminal trials (*c*); and even in civil cases corroborative evidence should be required, unless the proof of handwriting is so full and clear as to shift the *onus probandi.* Contradictory evidence of this kind, also, is frequent; the opposite sets of witnesses speaking with confidence, and apparently from equally sufficient data (*d*).

§ 921. The ground of the witnesses' opinion is therefore an important element in estimating their evidence. That which is least subject to error is having frequently seen the person write. Similar to this, and in general equally satisfactory, is having often seen specimens of his handwriting, which he has acted upon or recognised as genuine, or which have occurred in the course of a correspondence carried on upon the footing of his letters being authentic. There is, however, no rule of law defining a certain amount of acquaintance with the handwriting as indispensable; but the opinion of each witness goes to the jury along with the data on which it has been formed (*e*). At the same time, the genuineness of the writings upon

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(*c*) 2 Hume, 395—Tait Ev., 142. In Algernon Sidney's trial, the infamous Jeffries directed the jury that the evidence of three witnesses acquainted with the prisoner's handwriting was full and satisfactory proof. But the act reversing his attainder proceeds on the preamble that he was convicted "without sufficient legal evidence;" there having been found in his closet a paper which "was not proved by the testimony of any one witness to be written by him, but the jury were directed to believe it by comparing it with other writings" of his; 9 State Tr., 854.

(*d*) As in Buchanan *v.* Buchanan, 1810, Buchanan's Rep., 88—Turnbull *v.* Doods, 1844, 6 D., 897—Anderson *v.* Gill, 1850, 22 Sc. Jur., 478; aff., 3 Macq., 180. In the trial of Justice Johnstone, 1805, 29 State Tr., 414, there were four witnesses on this point for the Crown, and five for the prisoner; and in Bishop Atterbury's trial for publishing libellous letters (1723, 16 ib., 510, 623, 626), the number of witnesses on each side was three; and those adduced for the prisoner seemed to have the better means of knowledge. There was circumstantial evidence of guilt, and the House of Lords found for the prosecution. But forty peers dissented, on the ground (*inter alia*) that the handwriting had not been proved. See § 921 (*h*).

(*e*) In England, the opinion which a witness had formed from one previous document proved to be genuine was allowed to go to the jury; Burr *v.* Harper, 1816, Holt's N. P. Ca., 420; 2 Phil., 251. Evans, in his translation of Pothier (vol. ii, p. 186), mentions a case which occurred at Lancaster assizes in 1799, where a judge went the length

which the opinion is founded must be undoubted. Thus, to prove the handwriting of a member of Parliament, the testimony of an inspector of franks in the post-office, who had never had occasion to apply to him to verify his signature, was rejected in an English case (*f*). And where the question related to the handwriting in a certain book, it was held not to be enough that the witness had compared it with the will of the alleged writer, which lay in Doctor's Commons, and was supposed to be holograph; because the genuineness of that document was not admitted or proved (*g*). But in a trial before the House of Lords for publishing four libellous letters, said to have been written by the defendant's secretary, the handwriting was allowed to be proved by three clerks in the post-office, who had opened and copied three of the letters before forwarding them to their destinations, and who swore that these were in the same handwriting as the fourth, which was proved to have been written by the secretary (*h*).

§ 922. The other test of genuineness of handwriting by comparison of the writing in issue with genuine writings of the party—the comparison being made by persons previously unacquainted with the party's handwriting, and with a view to the individual trial—is competent both in civil and criminal causes (*i*).

§ 923. It may be made by the Court in cases where they decide without a jury (*k*); and by the jury both in civil (*l*) and crimi-

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of admitting an attorney who swore to a knowledge of the opposite party's handwriting from having once looked over his shoulder when writing a letter in an alehouse. But the judge "made some observations on the evidence which decided the fate of its credibility."

(*f*) Batchellor *v.* Honeywood, 1799, 2 Esp., 714.

(*g*) Randolph *v.* Gordon, 1818, 5 Price, 312.

(*h*) Bishop Atterbury's case, 1723, 16 State Tr., 510, 623, 626; *supra* (*d*).

(*i*) Stair, 4, 20, 24—Ersk., 4, 4, 71—2 Hume, 895—Burnett, 560—Tait Ev., 142.

(*k*) This was done by the Court of Session before the introduction of civil jury trials; Anderson *v.* Johnston, 1672, M., 12,660—Gaw *v.* Weems, 1675, M., 16,929—E. Eglinton *v.* Durham, 1706, M., 12,670—and recently in Anderson *v.* Gill, 1850, 22 Sc. Jur., 478. In modern practice the comparison is often made by the Court in suspensions in the Bill Chamber on the ground of forgery. Thus in M'Arthur *v.* Paterson, 1825, 3 S., 607—Bruce *v.* Borthwick, 1827, 5 S., 517—Paterson *v.* Mitchell, 1826, 5 S., 43—Ross *v.* Baxter, 1828, 6 S., 476—Wilson *v.* Mitchell, 1827, 5 S., 318—Fraser *v.* Thomson, 1827, 6 S., 323—and Ross *v.* Miller, 1831, 10 S., 95, suspension was granted without caution on the *comparatio literarum*, except in Ross *v.* Baxter, where caution was offered. In Troup *v.* Rigg, 1838, 1 D., 356, suspension was granted without caution, the circumstance as well as the comparison proving forgery. In Paterson *v.* Eccles, 1822, 1 S., 550, and Wylie *v.* Brand, 1836, 14 S., 553, suspension, on the ground of forgery, was refused after a comparison. See also Cameron *v.* Fraser & Co., 1830, 9 S., 141. On the great value which this inspection may be entitled to, see the remarks of Lords Ch. Eldon and Redesdale in Duff *v.* E. of Fife, 1823, 1 Sh. Ap. Ca., 512, 520.

(*l*) Hepburn *v.* Cowan, 1817, 1 Mur., 264—Melville *v.* Crichton, 1820, 2 ib., 293—

nal (*m*) trials; a practice which is also followed in England (*n*). The judge, however, generally cautions the jury not to rest their verdict on a comparison so made by themselves; which is useful as testing the evidence of witnesses to the handwriting, rather than as a substantive branch of the proof (*o*). In a late trial of an issue of forgery, the presiding judge allowed the jury to inspect the documents in the jury-box, but not to take them to their retiring room (*p*). Where the jury on a first trial inspected the documents, the Court, in considering a motion for a new trial on the ground of the verdict being against the evidence, will take the same course, in order that they may see the case as it was proved before the jury (*q*).

§ 924. Under this practice the judge or jury may form their opinions on grounds which have not been adverted to in the argument, and which the party to whom they are unfavourable might have shown to be fallacious, if he had anticipated that they would be regarded as important. On this account the Justiciary Court has on two occasions withheld the documents from the jury (*r*).

Lindsay *v.* Gilchrist, 1822, 3 ib., 103—Paul *v.* Harper, 1832, 10 S., 488—Bryson *v.* Crawford, 1834, 12 S., 937—M'Dowall *v.* Campbell, 1838, Macf. R., 100—Gellatley *v.* Jones, 1851, 13 D., 961—Macf. Pr., 226.

(*m*) Paul *v.* Harper, 10 S., 494, per L. Meadowbank—1 Alison Crim. Law, 413. It is understood that of late this practice has been less frequent. Lord Justice-Clerk Hope was understood to disapprove of it.

(*n*) 2 Phillips, 256—Taylor, 1221.

(*o*) See the following cases above noted (*l*). In Gellatley *v.* Jones (forgery), Lord President Boyle cautioned the jury "not to found their verdict on a comparison of the handwriting, but upon the evidence they had heard." In Lindsay *v.* Gilchrist (forgery), the Lord Chief-Commissioner, in allowing the jury to look at the genuine documents and those in issue, said, "but the jurors ought in all cases to act upon evidence, and it would be very dangerous were they to judge whether the documents are forged or not. . . . . You will look at the bills, not to judge by your skill in handwriting, but to see whether the witnesses properly describe the dissimilarity." His Lordship's charge in Melville *v.* Crichton was substantially the same, although not so copious. In Bryson *v.* Crawford Lord President Hope said, if the comparison tends "to satisfy you that the signatures in issue are written by the same person who wrote the genuine subscriptions, this is a piece of real evidence corroborative of the deposition of Christie;" a witness acquainted with the handwriting. In Paul *v.* Harper, Lord Meadowbank said (*obiter*), in criminal cases "it is the established practice to have the documents handed about for judges and jury to use their own eyes and form their own opinion from inspection. I do not pretend to say whether this be expedient or not." In Macdowall *v.* Campbell the same judge allowed the jury to look at the deed in issue, in order to see whether the signatures were like those of a person almost entirely unable to write.

(*p*) Gellatley *v.* Jones, 1851, 13 D., 961. (*q*) Paul *v.* Harper, 1832, 10 S., 488. (*r*) Robertson, 1849, J. Shaw, 186—M'Gale, 1849, ib., 194.

But it is understood that the practice on the point is far from being uniform.

§ 925. It is competent in Scotland, both in civil (*s*) and criminal (*t*) cases, to adduce engravers, writing-masters, bankers' clerks, and other persons whose attention is commonly directed to the examination of handwritings, and who have compared the writing in issue with genuine documents written or signed by the party. But the value of this evidence is very small; for, besides being subject to the same defects as the opinions of persons speaking from previous familiar knowledge, it arises from a forced acquaintance with the handwriting, derived from a few, often from selected, specimens; while the examination is made solely with a view to giving evidence in favour of the party to whom the witness looks for remuneration (*u*). When one is subject to such biassing influences, his evidence on a matter of opinion deserves but little credit; for even with an honest witness the wish is apt to be father to the thought. This class of witnesses, accordingly, can generally be got to swear on either side of the case, in equal numbers, and with equal confidence (*x*); indeed they very seldom refuse to give evidence for the party who first applies to them. It has been said that their chief use is to indicate those points to which the judge or jury should direct their attention, in comparing the writing in

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(*s*) Ersk., 4, 4, 71—Tait Ev., 142—Cases in following notes.

(*t*) 2 Hume, 395—1 Al. Crim. Law, 411—Harvey, 1835, Bell's Notes, 61—Hunters, 1838, ib., 61; 2 Swin., 14, S. C.—Fraser and Wright, 1835, Bell's Notes, 61.

(*u*) In Turnbull *v.* Doods, 1844, 6 D., 901, Lord President Boyle, after a judicial experience of more than thirty years, said,—"As to the handwriting, a set of engravers have been examined on both sides, to whose testimony I pay very little attention, as their opinion is very little to be depended on. In this, as in all other cases, they take different sides. It seems to be part of their profession to take different sides. I have sat in many cases, both civil and criminal, where the most respectable engravers gave the most opposite opinions. Theirs is a sort of evidence from which no safe conclusion can be drawn." In the same case, Lord Mackenzie said, "In almost all countries the evidence of persons of skill is almost totally abandoned on this subject." In Greig *v.* Clark, 1829, 7 S., 773, Lord Balgray observed, "It is very dangerous evidence to rest on." In Hunters, *supra*, where three engravers concurred in holding that certain documents were in the prisoner's handwriting, Lord Moncreiff termed the opinions of such persons "the worst possible species of evidence;" and the presiding judge (Lord Just.-Cl. Boyle) told the jury, that to himself and his brethren on the bench the evidence appeared deficient. The jury found that part of the charge "not proven."

(*x*) See, for example (from among many cases where this has occurred), Buchanan *v.* Buchanan, 1810, Buchanan's Rep., 89—Fraser *v.* Wilson, 1842, 4 D., 1171—See, also, per Lord President Boyle in Turnbull *v.* Doods, *supra;* and per Lord Meadowbank in M'Dowall *v.* Campbell, 1828, Macf. R., 100—Macf. Pr., 226.

issue with genuine documents (*y*). The Court has approved of the parties agreeing to dispense with this kind of evidence (*z*); and it is believed that now-a-days there are few juries and fewer judges who would be influenced by it.

This mode of proving handwriting is inadmissible in England (*a*), except for the purpose of showing whether the document in issue is written in an imitative style (*b*). The exclusion has been disapproved of by several text writers (*c*).

§ 926. Persons of skill, instead of being adduced as witnesses for either party, sometimes give their opinions under a remit from the Court. Being free from the biassing influences above adverted to, and being the results of deliberate and recent comparison by skilful eyes, these opinions sometimes carry considerable weight in questions of handwriting. Such remits are common in the Court of Session and Bill Chamber, when the case is not tried by a jury (*d*). They are not used in jury trials.

§ 927. With regard to the documents tendered as genuine for the purpose of comparison, the rule is that they must be dated before the one in issue, where they are in the handwriting of the person leading the proof, or some one with whom he is in concert; otherwise documents might be prepared for the purpose of comparison (*e*). But the opposite party is not so restricted (*f*). It is thought that documents collateral to the issue should not be received merely for this purpose, unless their genuineness is admitted; because a fair selection of them cannot be expected; and as each must be proved to be genuine before the comparison of it with the document in issue can proceed, a number of collateral trials would be required, which would tend to perplex the jury on the main question (*g*). Fac-similes of handwriting are also inadmissible for the purpose of comparison; because, being made piecemeal, they are apt to want the freedom and fluency of genuine writings; and it is absurd to use a fabricated document as a test

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(*y*) Per Lord Meadowbank in M'Dowall *v.* Campbell, *supra*—Per Lord Mackenzie in Turnbull *v.* Doods, *supra*. (*z*) M'Dowall *v.* Wighton, 1830, 5 Mur., 111.

(*a*) 2 Phil., 254; 255—Taylor, 1213—2 Evan's Pothier, 184—1 Greenl., 701.

(*b*) Phil., *supra*. (*c*) Taylor, *supra*—2 Evan's Pothier, 185.

(*d*) As in Henderson *v.* M'Artney, 1828, 6 S., 460—Wilson *v.* Hart, 1826, 4 S., 504—Case of Humphreys (*soi-disant* Earl of Stirling) in Court of Session, 1838, noted in Swin. Report of the trial, p. 163. As to how far the report of the person remitted to is conclusive, see *infra*, § 2000. (*e*) Cameron *v.* Fraser & Co., 1830, 9 S., 141—Ross *v.* Waddell, 1837, 15 S., 1219. (*f*) Fraser *v.* Wight, 1838, Bell's Notes, 61.

(*g*) See 2 Phill., 251—Taylor, 1213—1 Greenl., 701.

whether another document is genuine (*h*). Lithographic fac-similes are sometimes used of consent; but even this has been considered incompetent (*i*).

§ 928. Besides the evidence of handwriting, all other relevant circumstances are admissible in questions of improbation. Thus regard has been had to the facts that the drawer of a bill challenged as forged, was a notorious forger (*k*); and that the acceptor's name had been forged to other bills under nearly the same circumstances as the one in issue (*l*). So in a civil trial of forgery of the acceptor's name to a bill, proof was received that the signature of a co-acceptor was not genuine (*m*). There may also be proof of *alibi*, to show that the alleged granter could not have subscribed the document at the time and place set forth in it (*n*).

§ 929. Fabrication of a deed is sometimes proved by its pretended date being subsequent to that of the government stamp, or water-mark, on the paper upon which it is written, or by its being on a kind of paper the manufacture of which was not introduced till after the date which the deed bears (*o*). The paper mark, however, is by no means a sure test; for it is customary among manufacturers both to post-date and ante-date their paper moulds (*p*). A striking instance of forgery detected by anachronisms has been given in noticing the trial of Humphreys for forging writings in support of his claim to the Earldom of Stirling (*r*). In another

(*h*) E. Fife *v.* Fife's Tr., 1816, 1 Mur., 108—Kingan *v.* Watson, 1828, 4 Mur., 494.

(*i*) Per L. Ch. Commissioner in E. Fife *v.* E. Fife's Tr., *supra*.

(*k*) Milne *v.* Littlejohn, 1888, 1 D., 137. (*l*) Troup *v.* Begg, 1838, 1 D., 356.

(*m*) Gellatley *v.* Jones, 1851, 13 D., 961. (*n*) See Ersk., 4, 4, 71—In E. Eglinton *v.* Durham, 1706, M., 12,670, where it was only proved that the party had been seventeen miles away, the deed was sustained. (*o*) See Miller *v.* Fraser, 1826, 4 Mur., 118; 4 S., 551. (*p*) In Rodger *v.* Kay, 1834, 12 S., 317, the defender adduced two persons who believed they were the only makers of paper moulds in Scotland, and who stated "that it was not uncommon in practice, in making a mould as late as November in one year to give it the date of the ensuing year, or to post-date or ante-date the mould, or to affix the words 'London' or 'Bath' to moulds made to be used in Scotland." One of them was at the time of his examination (in 1834) making moulds with the date 1828, under a special order. See also Miller *v.* Fraser, *supra*.

(*r*) This case is fully noted *supra*, § 289. In Miss Edgeworth's tale of "Patronage," the denouément is founded on a will being discovered to be false by the counsel having, as a last resource, requested that the seal might be broken; whereupon the wax was found to contain a copper coin later in date than the pretended deed. In noticing this curious piece of real evidence, Mr Dumont (Abridg. of Benth. Ev., p. 185) says, "I have been told by the writer of the tale, that this denouément, which has been blamed as improbable, was taken from a real fact, and the anecdote had been preserved in her own family, which had particular reasons for remembering it."

case the date of an assignation to a bond and relative decree was proved to be false, by the fact that the decree was dated four months posterior to it (*s*). The same kind of proof was adduced in the English case of Lady Ivy (*t*). Two deeds were there founded on by the defendant, bearing to be dated in the second and third years of Philip and Mary, "King and Queen of England, Spain, France, both Sicilies, Jerusalem, and Ireland, Defenders of the Faith, Archdukes of Austria, Dukes of Burgundy, Milan, and Brabant, Counts of Hapsburg, Flanders, and Tyroll." The counsel for the plaintiff objected that Philip and Mary were not styled King and Queen of Spain, and of both the Sicilies, until several months after the pretended dates of the deeds; and that their title of Archduke of Burgundy had never been put before that of Milan. This objection was proved by the statute-book and the fines of the Easter term following the pretended dates of the deeds, which showed that the old style had then been used in the public records. Several conveyances, also of the same period, were all in the old style; and the defendant was unable to meet the challenge of the plaintiff's counsel, to produce a single genuine deed of that time bearing the titles which appeared in the deeds in issue. The mode in which these had been fabricated, and made to bear the appearance of age, was also proved by direct evidence (*u*), which reminds one of the literary frauds of Chatterton. The jury found for the plaintiff, thus determining that the deeds were forged.

§ 930. In questions as to the authenticity of wills there is frequently proof of the terms on which the testator lived with the persons favoured by the deed, and of his good or bad feeling towards his next of kin. Sometimes, also, the ability of the testator to have endured the fatigue of writing several pages at the date of a will bearing to be holograph is in evidence; as well as the opportunities

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(*s*) M'Math *v.* Oliphant, 1674, M., 12,665; 6788. (*t*) Mossam *v.* Dame Theodosia Ivy, 1684, 10 State Tr., 555; 615.

(*u*) One witness stated, "I did see Mr Duffet forge and counterfeit several deeds for my Lady Ivy. . . . For the making of the outsides look old and dirty, they used to rub them on windows that were very dusty, and wear them in their pockets to crease them for some weeks together, according as they intended to use them. . . . When they had been rubbed upon the window it was used to lay them in a balcony, or any open place for the rain to come upon them and wet them, and then the next sunshine day they were exposed to the sun, or a fire made to dry them hastily, that they might be shrivelled." Another witness identified certain bottles as having contained the ink with which the forged deeds had been written. She stated that the person who wrote the deeds had told her that "with ink out of these bottles he could make new written writings look like old ones very soon." 10 State Tr., 622, 3.

which the persons founding on the will had of access to the deceased's repositaries (*x*). And the subsequent acts of the granter of a deed may prove its genuineness; as where he has recognised it as valid (*y*); or where it is narrated in another deed, which is admitted or proved to be genuine (*z*).

§ 931. In the time of Lord Stair the indirect manner of improbation by comparison of handwritings, &c., was "not competent, while the direct manner was competent" (*a*). Mr Erskine (*b*) observes, at greater length but less decidedly, "As a direct manner of improbation affords a full and strictly legal evidence, whereas in the indirect the proof is merely presumptive, a rule has thence arisen (which, however, is not always observed) that there is no place for the indirect so long as the direct is in our power." According to Mr Burnett (*c*), "it has been held as a rule that when the direct mode of proof can be resorted to, there is no room for the indirect. This (he says) is founded on the maxim that the best evidence ought in every case to be brought. This rule, however, has not always been adhered to in the proof of forgery. It has generally been left more as a matter of argument to the jury, than determined in the first instance by the Court." Lord Bankton (*d*) lays down distinctly that the old rule, which required the direct proof to be adduced before admitting the indirect, has been abandoned. He says, "It was formerly thought that the indirect manner was not competent while the direct manner could be used, the instrumentary witnesses being alive; but it hath been since found otherwise (*e*). This happens when the witnesses insert are persons of no fame, or other circumstances concur for not adducing them." The point arose in a recent trial on an issue, whether a trust-settlement, bearing to have been regularly subscribed before witnesses, was forged. The party challenging the deed tendered evidence of engravers, without having previously examined the instrumentary witnesses; whereupon the presiding judge (Lord Justice-Clerk Hope) observed that the proper course was to commence by ex-

(*x*) See illustrations of this class of cases in Buchanan *v.* Buchanan, 1810, Buchanan's Rep., 88—Turnbull *v.* Doods, 1844, 6 D., 896—Anderson *v.* Gill, 1850, 22 Sc. Jur., 478.[3]

(*y*) As in Thomson *v.* M. Annandale, 1829, 7 S., 305. (*z*) See Duff *v.* E. Fife, 1823, 1 Sh. Ap., 451, per L. Ch. Eldon. (*a*) Stair, 4, 20, 26.

(*b*) Ersk., 4, 4, 70. (*c*) Burnett Crim. Law, 561. (*d*) Bankt., 1, 10, 230. (*e*) Citing Newt. Decis., 49; An., 1683, June 1723; Innes. This case has not been found in the books.

[3] 20 D., 1326. In House of Lords, 1858, 2 Macq., 180; 80 Sc. Jur., 497.

amining these persons; because the deed being put in by the pursuer proved itself, and he must begin with the primary evidence on the fact of its execution. His Lordship considered that as one of the instrumentary witnesses had been called as a defender unnecessarily, it would, in the circumstances of the case, be most unjust and dangerous to admit the evidence of engravers in the first instance. The pursuer having thereupon consented to a verdict in favour of the witness who appeared as a defender, and having again tendered engravers without adducing either of the instrumentary witnesses, the defender objected that the latter should first be called. The learned judge "thought that on principle the objection was sound; but that in the circumstances of the case it would not be prudent to apply the principle, especially after having secured to the defender the benefit of the evidence "of the instrumentary witness who had previously been a defender." His Lordship, however, "intimated that he was very doubtful whether this was not too great a relaxation of the rules of evidence in favour of the pursuer" (*f*).

§ 932. With great deference to the opinion thus quoted, it is thought that the rule laid down by Bankton, and supported (as Burnett states) by modern practice, is correct, namely, that the party challenging a deed as false is not obliged in law to adduce the writer or instrumentary witnesses, and that their absence is only a matter for observation to the jury by the other party. The instrumentary witnesses may have been accessory to the fraud which the party leading the proof seeks to expose; or he may know that, either from want of recollection or from partiality to his opponent, their testimony would be prejudicial to him. Besides, in most cases the evidence of persons against the authenticity of a deed which they attest is open to grave suspicion (*g*). If, then, a party challenging a deed were obliged to commence with examining the instrumentary witnesses, he would often have first to disprove his own case, and then to lead proof in contradiction of witnesses of little credibility, whose evidence he fully expected would be in

(*f*) Fraser *v.* Wilson, 1842, 4 D., 1171. (This case does not seem to have been before the Court, either on a bill of exceptions or a motion for a new trial.) The learned judge's opinion is supported by an old case, Monteith *v.* Henderson, 1677, 2 B. Sup., 219, where "the Lords found that if there were no doubtfulness in the improbation by writer and witnesses, there was no room for the indirect manner;" but admitted the latter on account of the direct evidence not being conclusive. The finding in this case assumes that the writer and instrumentary witnesses require first to be examined.

(*g*) *Supra*, § 911.

favour of his opponent. This mode of procedure seems to be both anomalous and unnecessary; since it is equally in the power of the other party to adduce the instrumentary witnesses, if he thinks that their evidence ought to be laid before the jury. Indeed, it may be taken for granted that when one party does not adduce them, he anticipates that their depositions would favour his adversary. The rule which requires the best evidence seems not to make it necessary for the pursuer to commence by examining them; because, as already mentioned, that rule does not exclude evidence from one source of information, merely because better evidence from some other, but independent, source has not been exhausted (*h*).

§ 933. Neither principle nor practice requires persons previously acquainted with the handwriting in issue to be examined before skilled witnesses speaking to a *comparatio literarum.*

The rules as to examining one bank officer in questions of forgery of the handwriting of another have been already noticed (*i*).

CHAPTER IX.—OF THE DELIVERY OF DEEDS.

§ 934. Most deeds require not only to be validly executed, but also to be delivered to the grantee or some one for his behoof; because so long as a deed remains in the granter's custody and under his control, it cannot be held that he has finally resolved to be bound by it (*a*). The rule is also designed for protecting creditors against fraud by debtors granting latent deeds to their prejudice (*b*).

I. *What Writings require to be delivered.*

§ 935. Delivery is indispensable to most unilateral deeds, whether onerous or gratuitous (*c*). This holds with peculiar force as to bonds, bills, and other writings of personal obligation; the possession of which by the obligant raises the double presumption that they were either not delivered, or were returned to the granter on payment or discharge (*d*). So, a deed of discharge undelivered

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(*h*) See *supra*, § 75, *et seq.* (*i*) *Supra*, §§ 80, 81. (*a*) Ersk., 3, 2, 48—Bell's Pr., § 23—Tait Ev., 156. (*b*) Dishingtoune *v.* Dishingtoune, 1628, 1 B. Sup., 259—Simpson *v.* Finlay, 1697, M., 11,570—Boyd *v.* Laird of Niddrie, 1661, M., 16,993. (*c*) Ersk., *supra*—Tait, *supra.* (*d*) See *infra* § 951.

will be held to have been executed *spe numerandae pecuniae* (*e*); and a creditor arresting a debt will not be prejudiced by a discharge of it which was executed before, but not delivered till after, the arrestment (*f*). In like manner, a decree-arbitral not delivered to the parties, or intimated to them as containing the arbiter's final determination, is held only to contain an intended decree, although it may have been placed in the hands of the clerk to the submission (*g*). A deed which does not fall under any of the exceptions afterwards noticed will not be sustained if it was found undelivered in the granter's repositories after his death (*h*); even where the suddenness of that event, and the circumstances of the case, make it highly probable that he had finally resolved to be bound by the deed (*i*).

§ 936. Where there are several co-obligants, each of them is entitled to cancel his subscription, or to resile, so long as he has not parted with the deed for the purpose of delivery to the creditor (*k*). And the transmission of such a deed among the co-obligants themselves does not destroy the right of any of them to resile so long as the obligee has not received delivery (*l*).

The rule which requires delivery is subject to the following exceptions.

§ 937. *Deeds which contain a clause dispensing with delivery* are effectual although undelivered, because they sufficiently mark the final intention of the granter (*m*). They are of the nature of *mortis causa* deeds, retained for the purpose of cancellation if the granter chooses; but meant to be effectual if not revoked during his life. It has been said that a clause dispensing with delivery is of no importance, except for proving that this was the granter's purpose; "because if delivery were required by law to make a deed effectual, the granter or testator could not by his own act alter the rule of law" (*n*). Certainly such a clause will not make the deed in which

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(*e*) Cochrane *v.* Pringle, 1709, M., 12,714—Dickson *v.* Hume, 1627, 1 B. Sup., 49.

(*f*) Boyd *v.* L. Niddrie, *supra*. (*g*) M'Nair *v.* Gray, 1827, 5 S., 735; affd., 5 W. S., 805—Robertson *v.* Ramsay, 1783, M., 653; 17,009; Hailes, 912, S. C.—Simpson *v.* Strachan, 1736, M., 17,007; Elch., "Arbitration," No. 2, S. C.

(*h*) Cochrane *v.* Pringle, *supra*—Stamfield's Crs. *v.* Scott, 1696, 4 B. Sup., 344.

(*i*) Stamfield's Crs. *v.* Scott, *supra*—See analogous cases *supra*, § 669.

(*k*) M'Gill *v.* Edmonstone, 1628, M., 16,991—Glendinning *v.* Wylie, 1634, M., 16,992—Fisher *v.* Campbells, 1736, Elch., "Presumption," No. 7.

(*l*) Cases in preceding note—See also Cheyne *v.* L. Rosehill, 1679, 2 B. Sup., 242.

(*m*) Stair, 1, 7, 14 (7)—Ersk., 3, 2, 44—Bell's Pr., § 24—Logan *v.* Logan, 1823, 2 S., 253. (*n*) More's Notes, 408.

it occurs effectual, while undelivered, in competition with one which has been followed by delivery (*o*).

A deed making certain alterations upon a prior deed, which contained a clause dispensing with delivery, was held to be effectual, although undelivered; because it was accessory to the first deed (*p*).

§ 938. *Writings of a testamentary nature* take effect without delivery; because they are meant to be final expressions of the testator's will, provided they are found unrevoked in his repositories after his death (*r*). This applies not only to deeds in the form of testaments, but also to dispositions or assignations reserving the granter's liferent and power to alter (*s*), or only reserving power to alter (*t*). The same rule was applied to a deed of entail, which conveyed the liferent to the granter's wife and reserved power to revoke (*u*); and to a deed conveying the granter's whole estate in trust, for payment of the liferent to himself, and the fee to persons to be named by him (*x*).

In like manner, where a deed contains a reserved power to alter even on deathbed, a writing in exercise of that power is effectual without delivery; because the reservation imports that merely executing a deed of alteration should be sufficient (*y*).

§ 939. *Bonds of provision* and other writings by a person in favour of his children are effectual without delivery, because parents are the proper custodiers of their children's writings (*z*), and because such deeds are generally intended to be revocable and *mortis causa*. Thus the Court sustained a bond obliging the granter to infeft his younger son (*a*), and a bond of provision by a father to his children (*b*), where in each case the deed had been found in the deceased father's repositories. A deed of entail conveying an estate

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(*o*) See Stair, 1, 7, 14 (8). (*p*) Eleis *v.* Ingliston, 1669, M., 16,999.

(*r*) Ersk., 3, 2, 44—Bell's Pr., § 24—See Bayne *v.* Nisbet, 1695, 4 B. Sup., 252.

(*s*) Stair, 1, 7, 14 (7)—Stark *v.* Kincaid, 1697, M., 17,032—Hadden *v.* Shorswood, 1668, M., 16,997—Cochranes *v.* Thomson, 1686, 2 B. Sup., 94—Canon *v.* Gordon, 1687, 2 ib., 108. (*t*) Young *v.* Wauchope's Heirs, 1685, 4 B. Sup., 259.

(*u*) Porterfield *v.* Stewart, 1822, 1 S., 9. Reported on other points in 8 S., 16; 2 W. S., 369; 5 W. S., 515. (*x*) Brack *v.* Hogg, 1827, 6 S., 113; affd., 5 W. S., 61. (*y*) Hamilton *v.* His Sisters, 1624, M., 4098—M'Bride *v.* Bryson, 1680, M., 17,002, 3 B. Sup., 317. In Trotter *v.* Pitcairn, 1706, M., 17,004, an assignation to a special subject executed in favour of the granter's widow and nieces, and dated after his will, having been found in his repositories after his death, was sustained as a special legacy. But this was by the narrowest majority. (*z*) Stair, 1, 7, 14 (7); Ersk., 3, 2, 44; Bell's Pr., § 24. (*a*) L. Cardross *v.* E. Mar, 1689, M., 11,440 16,993, S. C. (*b*) Wallace *v.* Wallace, 1624, M., 6344; 11,440; 16,989, S. C.

to the granter's eldest daughter if she married a certain person, and failing her doing so, to his second daughter, having been found in the father's repositories, was sustained in favour of the substitute, the eldest daughter not having implemented the condition (*c*). In like manner, a bond of provision granted by a person while *in liege poustie*, but delivered when he was on deathbed, was held to be effectual (*d*). An undelivered assignation to a son foris-familiated has been sustained, although he seems to be the proper custodier of his own deeds (*e*). The rule includes deeds in favour of the granter's natural children (*f*), and deeds by mothers (*g*).

§ 940. On the same principle, deeds in favour of the granter's wife are effectual although found in his possession; as he is the legal custodier of her writings (*h*).

§ 941. In one case, where a person of considerable wealth died leaving a son and a minor daughter, the Court found that a bond for 4000 merks, which the son had granted as her tocher, was of the nature of a bond of provision, and did not require to be delivered. They considered that the son had only granted the provision which the father would have allowed if he had been alive, and that the deed was in fulfilment of the granter's obligation to aliment his sister, to whom he stood *in loco parentis* (*i*).

§ 942. According to Erskine, *a deed in which the granter has a reserved right* (*e.g.*, of liferent) is effectual without delivery; because he is presumed to retain it for his reserved interest, and not because his intention that it should be effectual is inchoate (*k*). This reason is satisfactory; but, in the only case (*l*) which the learned author cites in support of the doctrine, there was a reserved power to alter, and the case therefore comes within another of the exceptions considered above. A disposition under reservation of an annuity to the granter, not being delivered, was held not to secure

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(*c*) Stevenson *v.* Stevenson, 1677, M., 15,475; 17,000, S. C. (*d*) Adair *v.* Adair, 1725, M., 17,006. (*e*) Monro *v.* Monro, 1712, M., 5052; 17,006, S. C. (*f*) Ersk., 3, 2, 44—Aitkenhead *v.* Aitkenhead, 1663, M., 16,994.

(*g*) Ersk., *supra*—See Hamilton *v.* his Sisters, 1624, M., 4098.

(*h*) Ersk., *supra*—Tait Ev., 159—L. Lindores *v.* Stewart, 1715, M., 6126; 17,006, S. C.; *contra*, Dickson *v.* Dickson, 1627, M., 16,990; 1 B. Sup., 238, S. C. But a wife's deeds in favour of her husband require delivery; Lady Bathgate *v.* Cochrane, 1685, M., 6077; 11,569; 17,004; S. C. (*i*) Morrison *v.* Morrison, 1693, 4 B. Sup., 40.

(*k*) Ersk., 3, 2, 44—See also Tait Ev., 160—Duff Feud., 29—Per L. Lyndhurst in Brack *v.* Hogg, 1831, 5 W. S., 68. (*l*) Hadden *v.* Shorswood, 1668, M., 16,997. This was also the fact in Stark *v.* Kincaid, 1679, M., 17,002; cited by Mr Tait (*supra*) in support of the same view.

the disponee in competition with the Crown claiming the granter's estates on attainder (*m*).

§ 943. A deed executed *in implement of an antecedent obligation* seems to be valid without delivery; because, as the creditor could have insisted on its being granted, he is entitled to recover it when it has been executed (*n*). On this ground, an heritable bond found in a bankrupt's possession, having been executed in implement of a previous written agreement, was held to be effectual in a reduction on the act 1696, c. 5 (*o*).

§ 944. Delivery is not requisite in *bilateral contracts* which have been signed by all the parties; because those of them who have subscribed and handed the deed to the party in whose possession it appears, are effectually bound whenever that party has signed; and the mutuality of the contract forbids that some of the parties should be bound, while others are free (*p*). But if only one of the parties has signed, and has retained the deed in his own hands, the others cannot insist on having it delivered in order that it may be completed (*r*). It has been seen that unilateral obligations by several co-obligants are ineffectual, until they have been delivered to the obligee (*s*).

The rule, that delivery is not required in mutual contracts, does not prevent either party from proving that such a deed, when found in the hands of a third person, had been deposited for conditional delivery or implement (*t*). The rules as to the mode of proving the conditions are noticed afterwards (*u*).

§ 945. There is some doubt whether, if a deed is found in the hands of the grantee *with a discharge or transference indorsed on it*, the latter deed is effectual notwithstanding the want of delivery (*v*). In one case (*x*), where a bill indorsed to a person named had been placed by the indorser shortly before death in the hands of his heir, but without special directions regarding its disposal, the Court found the indorsee entitled to the document; and it was ob-

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(*m*) L. Advocate *v.* Drummond, 1750, M., 4875; Elch., "Forfeiture," No. 15; affd., Cr. and St., 503; S. C. (*n*) Ersk., 3, 2, 44—See also Morrison *v.* Morrison, 1693, 4 B. Sup., 40, *supra*. (*o*) Cormack *v.* Anderson, 1829, 7 S., 868.

(*p*) Stair, 1, 7, 14 (7)—Ersk., 3, 2, 44—Bell's Pr., § 84—Stewart *v.* Riddock, 1677, M., 11,406—Crawford *v.* Vallance's Heirs, 1695, M., 12,304; 16,990—Lockhart *v.* Baillie, 1709, M., 8430. (*r*) Hamilton *v.* D. Queensberry's Exs., 1833, 12 S., 206.

(*s*) *Supra*, § 936. (*t*) Stair, 1, 13, 4—Douglas *v.* Lauder, 1631, M., 12,703—Crawford *v.* Vallance's Heirs, *supra*—Drummond *v.* Campbell, 1662, M., 12,309—See *infra*, § 966. (*u*) See *infra*, § 967, *et seq.* (*v*) See Tait Ev., 160.

(*x*) Carrick *v.* Key, 1787, M., 17,009.

served on the bench, that "where the conveyance, being contained in the same writing, is inseparable from the document itself, the rule requiring delivery does not hold. This is analogous to the case of a discharge or declaration of trust written on the back of a bond for borrowed money; which must create an inherent qualification of the debt." The report does not state whether the other judges adopted this view; and the decision may have proceeded on the principle of the indorsation being a special legacy, which the deceased by his conduct directed his heir to pay. In an earlier case, where a bill with a discharge indorsed on it had been found in the repositories of the creditor on his death, the Court refused to sustain the discharge, on the ground that, as it had not been delivered, there was a legal presumption that it had been granted merely *spe numerandae pecuniae* (*y*). It is thought that delivery is not requisite in such cases to make a discharge effectual; but that non-delivery is an element in the proof admissible in each case for the purpose of ascertaining whether the discharge was written in contemplation of a settlement, or in order to show that the right had been abandoned. Indorsing a discharge on a document of debt seems, in most cases, to be a marked token of its extinction.

II. *What constitutes, or is equivalent to, Delivery.*

§ 946. Delivery consists in the actual transference of the possession of the deed; and it does not require either a ceremony of any kind, or a narrative of the *res gestae*. It is most simple and unequivocal where the granter personally hands the deed to the grantee. Next to this is his delivering it, or directing it to be delivered, to a person expressly for behoof of the grantee. And it is not necessary that the grantee should have been aware of the delivery; his consent not being required for its completion (*z*).

§ 947. But possession by the grantee, or by another person in his name, is ineffectual, unless it was obtained with the granter's consent, and for the purpose of delivery. This is the case where the deed has been acquired surreptitiously (*a*). So, where the tutor of a creditor in pupillarity declined to take delivery of a new bond of caution; but borrowed it for comparison with the previous bond, and then returned it to have a certain alteration made; and where the granter's agent again tendered delivery, but the tutor

(*y*) Cochrane *v.* Pringle, 1709, M., 12,714. (*z*) Stair, 1, 10, 5—Borthwick *v.* Lawrie, 1686, M., 7735. (*a*) See cases *infra*, § 953.

declined it, because his office had expired; the Court held the deed to be undelivered (*b*). Thus, also, where Woomet granted an assignation to Boyd, partly for his own and partly for Boyd's behoof, receiving from Boyd a back-bond; and where Woomet afterwards, intending to transfer his interest to Biggar, executed in favour of Boyd a discharge of the back-bond, and Boyd delivered a new back-bond to Biggar; but the discharge from inadvertance remained in Biggar's hands undelivered;—in a competition between Biggar and an arrester of Woomet's interest, the arrester was preferred; because the discharge had not been delivered to Boyd or to some one on his behalf (*c*). In like manner, where an obligation to dispone lands had been handed to a conveyancer with directions to prepare a charter in favour of the grantee, the Court held it to be undelivered, unless the grantee proved that it had been deposited for the purpose of delivery (*d*).

§ 948. If the granter of a deed records it in a public register, he is presumed to intend it shall be effectual; and therefore such a proceeding is equivalent to delivery (*e*), and has the same effect in preventing revocation (*f*). But of course this does not hold if the registration was without the granter's consent (*g*). The question was once raised, but not decided, whether parole proof of the granter's orders to record is admissible in a competition between the disponee and the Crown as in right of the granter's forfeited estates (*h*).

§ 949. A disposition on which sasine has passed (*i*), and an intimated assignation (*k*), are effectual without delivery, provided the granter consented to the grantee's right being so completed. And where a party, having granted an assignation for relief of the assignee who had become his cautioner, used horning thereupon in the

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(*b*) Glendinning *v.* Wyllie, 1634, M., 16,992. (*c*) Boyd *v.* L. Niddrie, 1661, M., 16,993. (*d*) Byres *v.* Johnstone, 1626, M., 16,990; 8405.

(*e*) Ersk., 3, 2, 44—Tait Ev., 160—Duff Feud. Con., 29—Bruce *v.* Bruce, 1675, M., 11,185; 17,000—Gordon *v.* Dewar, 1771, M., 15,579—Downie *v.* M'Killop, 1843, 6 D., 180—Leckie *v.* Leckie, 1776, M., 11,581; M., "Presumption," Appx., No. 1.; Hailes, 721; 5 B. Sup., 432, S. C. (*f*) Downie *v.* M'Killop, *supra*—Gordon *v.* Dewar, *supra*—Bruce *v.* Bruce, *supra*—See also Leckie *v.* Leckie, *supra*.

(*g*) See Scott *v.* Dishington's Cr., 1628, M., 12,305—Downie *v.* M'Killop, *supra*.

(*h*) L. Advocate *v.* Drummond, 1750, Elch., "Forfeiture," No. 15; reported on other points in M., 4875; Cr. and St., 503. (*i*) M'Intosh *v.* M'Intosh, 28th Jan. 1812, F. C.—Bruce *v.* Bruce, 1675, M., 11,185; 17,000—Stair, 1, 5, 6 (5).

(*k*) Maclurg *v.* Blackwood, 1680, M., 845—Trotters *v.* Lundy, 1667, M., 11,498—But see Cockburn *v.* L. Craigievar, 1672, M., 11,493, noted *infra*, § 977.

assignee's name, the assignation was held to be effectual, although it had not been followed by delivery (*l*).

§ 950. The judicial ratification by a wife of a deed affecting her own estate is not equivalent to delivery; because that procedure is only designed for securing free consent to her subscription (*m*).

It has already been shown that handing the deed from one co-obligant to another does not constitute delivery to the creditor (*n*).

III. *Presumption and Proof as to Delivery of Deed found in the granter's possession.*

§ 951. A deed found in the granter's possession is presumed either not to have been delivered, or to have been returned after delivery for some reason inconsistent with its remaining effectual (*o*). This is peculiarly the case as to those documents (*e.g.*, bonds and bills) which, on payment, are often retired without a discharge; and which, as already noticed, are liable in a high degree to the presumption *chirographum apud debitorem repertum presumitur solutum* (*p*).

There is an important distinction as to the evidence by which these presumptions may be overcome.

§ 952. Where a deed is in the hands of the granter, and the grantee avers that he returned it to that party for a special purpose without abandoning his right to it, his averment resolves into one of trust in the granter of the deed, and in general is not provable by parole (*r*). This rule is illustrated by a case where a bond of provision granted by an heir to his mother-in-law and half-brothers had been cancelled, and the grantees alleged that it had been borrowed by the granter from his father (in whose hands it had been deposited) in trust for a special purpose, and had been cancelled by the granter without the father's authority. The Court held that the averment could only be proved by the son's writ or oath, "there being no force alleged, but a naked trust" (*s*). In another case, where a superior pursued a declarator of non-entry, which the vassal defended on the ground that the pursuer's ancestor had signed and delivered to him a precept of *clare constat*, but that he (the

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(*l*) Dick *v.* Oliphant, 1677, M., 6548. (*m*) L. Bathgate *v.* Cochrane, 1685, M., 6077; 11,569; 17,004, S. C. (*n*) *Supra*, § 936. (*o*) Stair, 1, 7, 14 (5).
(*p*) *Supra*, § 880. (*r*) Stair, 1, 7, 14 (5)—Tait Ev., 162.
(*s*) Aikman *v.* Aikman, 1677, M., 12,281.

vassal) had afterwards returned it to the pursuer in order to have it sealed; the Court would not allow the averment to be proved by parole, but only by the pursuer's writ or oath (*t*). Thus, also, where Dick as his father's factor had executed an assignation in favour of Fairly; and, on its being found in Dick's hands, Fairly alleged that it had been placed there in order to be used by Dick as his (Fairly's) agent; the Court refused to admit the averment to proof by witnesses (*u*).

§ 953. But where the grantee, under a deed which is found in the granter's possession, avers that that possession was acquired by force or fraud, he may instruct his averment by parole; for dole may always be proved *prout de jure* (*x*). Thus a bill which had been found in the hands of the debtor without a discharge or conveyance, was restored to the creditor after proof by parole that it had been abstracted from a party with whom he had deposited it (*y*). So the Court allowed a proof that the repositories of the creditor in a bond had been broken open and the deed removed; and that, after passing through some other persons' hands, who had no right to it, it had come into the possession of the debtor (*z*). And where the creditor in a bond was an ignorant woman, and the debtor was her law-agent, and had access to her papers, he was required to condescend on how the bond came into his hands, as the relative positions of the parties laid the burden of proof upon him (*a*). Thus, also, where the principal debtor under a bond signed by him and a cautioner, when intromitting with it as tutor of the creditor's heir, delivered it to the cautioner, who tore off his subscription, but retained the document; the Court, holding that he would have been entitled to cancel his subscription on receiving the deed for that purpose, found that he would not be bound "unless it were proved that the bond was destroyed by force or fraud, and that the cautioner was party to the fraud" (*b*). This implies that the proof referred to might be by parole.

§ 954. There are two cases in which parole evidence was received with a view to overcoming the presumption as to a deed found in the hands of the granter, where neither fraud nor force in

(*t*) E. Rothes *v.* Grant, 1626, M., 12,273. (*u*) Fairly *v.* Dick's Crs., 1666, M., 12,278. (*x*) See Stair, 4, 32, 3—ib., 4, 45, 24—See also *supra*, §§ 344; 359; 628. (*y*) Edward *v.* Fyfe, 1823, 2 S., 431. (*z*) Fithie's Children *v.* E. Northesk, 4 B. Sup., 70. (*a*) Burgh *v.* Jenkins, 1710, M., 11,410. (*b*) Monkton *v.* Carmichael, 1623, M., 11,404. This decision is questioned by Mr Tait; Ev., 164.

obtaining the deed were averred. In one of these cases, the creditor in a bond in the possession of the granter offered to prove by four Lords of Session that, after the deed had been delivered, it had been returned in order that the granter might get it subscribed by cautioners; and the Court "inclined to admit their probation" (c). But this case, which is of old date, seems not to be of much authority, as the Court were influenced by the trust-worthiness of the witnesses tendered; and, as the case occurred at a time when the rules of evidence, especially where trust was involved, were not strictly observed. In the other case referred to the following facts occurred:—Southside, having right to a bond granted by Cass, entered into a transaction regarding it with the curators of Cass's heir, and got from the heir with their consent a new bond; but the heir having been restored against that deed on the ground of lesion, Southside pursued him for payment of the first bond. He replied that the document was in his hands, and the presumption therefore was that it had been discharged; to which Southside replied that the bond had been delivered in contemplation of the transaction, which had been annulled, being implemented. The Court ordained the curators to be examined *ex officio* as witnesses upon Southside's averments; and they refused to hold that these could only be proved by the heir's writ or oath, "because the manner of the delivery of the bond, and the cause thereof were so evident, and the probation so strong and pregnant" (d). The circumstances, indeed, were sufficient of themselves to convince any one of the truth of Southside's statement. The case, therefore, was a favourable one for examining witnesses *ex officio*, according to a practice common at one time in cases where restricting the proof to writ or oath of party appeared likely to occasion injustice.

IV. *Presumption and Proof as to Delivery of Deed found in the grantee's possession.*

§ 955. When a deed is found in the hands of the grantee, there is a strong presumption that he received delivery of it from the granter, or some one acting under the granter's authority, and that he fulfilled the conditions (if there were any) under which the granter intended that it should be delivered (e).

(c) Melvil v. Murray, 1610, M., 12,271; questioned by Tait Ev., 163.

(d) Ellias v. Cass, 1671, M., 12,280.

(e) Stair, 1, 7, 14, and 4, 42, 8—Ersk., 3, 2, 43—Tait, 167.

§ 956. Stair and Erskine (*f*) lay down that this presumption can only be overcome by the grantee's writ or oath. But it is humbly thought that the distinction noticed in the preceding sections applies here also. Thus, on the one hand, where the granter acknowledges having handed the deed to the grantee, but alleges either that delivery was not intended, or that it was conditional, this, being like an averment of a trust restricting *bona fide* possession by the grantee, seems to be provable only by his writ or oath (*g*).

§ 957. On the other hand, where it is alleged that the grantee acquired the deed by force or fraud without the granter's consent, parole seems to be admissible. Thus it was received to prove that a general disposition (not *mortis causa*), found in the hands of the grantee, in whose house the granter died, had been in the granter's possession until his deathbed illness, and had been improperly abstracted by the grantee from among his papers after his death (*h*). In another case, the Court allowed a proof before answer that a bill found in the hands of an alleged onerous indorsee had not been completed with the drawer's signature till after the acceptor's death, and that the drawer had improperly got possession of the bill from the acceptor's repositories (*i*). Again, where a bond of provision was alleged to have been got up from the depositary by improper means ("*viis et modis*") the Court allowed the party and the instrumentary witnesses to be examined *ex officio*, as to whether there had been a depositation, and, if so, what were its terms, and how it came to be concluded (*k*). The Court also ordained witnesses, and if need be the creditor, to be examined *ex officio* on the allegation that the deed (a bond) had been lying undelivered in the repositories of the principal debtor, and that he had been unable to manage his affairs for some years before his death (*l*). And witnesses were examined *ex officio* on an alleged fraudulent re-acquisition by

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(*f*) Stair, ib.—Ersk., ib. In Ogilvie *v.* L. Balmerino, 1699, 4 B. Sup., 446, where the grantee in a disposition deponed that he got the deed from a third person, who told him he had received it for delivery to him, the Court held it to be undelivered, because there was not proof that the delivery had been by the granter's order.

(*g*) See Tait Ev., 168. Rutherford *v.* Rutherford, 1670, M., 12,318.

(*h*) Cathcart *v.* L. Corsclays, 1679, M., 12,325. (*i*) Farquhar *v.* Shaw, 1757, M., 12,341—In Bruce *v.* Alexander, 1676, 2 B. Sup., 193, parole was admitted as to a bond of provision which the granter alleged his daughter, the grantee, had stolen out of a locked box in which he had kept it. (*k*) Stewart *v.* Blackhall, 1703, M., 12,332. (*l*) Cheyn *v.* L. Rosehill, 1679, 2 B. Sup., 242.

the grantee of a bond after payment (*m*). Thus, also, where a contract of lease, which had been in the hands of a depositary, was alleged to have been got up by the tenant by "some unorderly means," and without performing the conditions on which delivery was to have been made, the depositary and persons present at the contract were examined *ex officio*, and before answer (*n*). The principle which these decisions recognise is supported by a case where the Court admitted witnesses to prove that a deed, when blank in the name of the grantee, had been abstracted from the deceased granter's repositories, and completed fraudulently by the person whose name it bore when produced (*o*).

§ 958. But there are cases of an opposite tendency. In one of them it was alleged that a bond which had been deposited with a third person for conditional delivery, had, with concurrence of the creditor, been abstracted fraudulently from the depositary's premises during his absence; and the Court held that the averment could be proved only by the oath of the creditor, and not of the depositary (*p*). The question, however, seems to have been whether the depositary's oath on reference might be taken, and not whether a proof by witnesses was admissible. In another case, where a bond was alleged to have been surreptitiously abstracted from among the debtor's writs, and registered and followed by apprising during his residence abroad; the Court, before answer as to the admissibility of witnesses to prove the averment ("which they found hard to be done, tending to destroy the bond"), ordained the creditor to be examined *ex officio*, and, on his admitting the facts, they cut down the deed (*r*). Again, where a party sought to reduce a disposition on the ground that, after the granter's death, the disponee had improperly completed it by filling in his own name, when it was lying in his hands blank in the name of the disponee, the Court restricted the proof to the defender's writ or oath (*s*). A similar decision was pronounced in regard to a bond, which the granter averred he had executed blank in the creditor's name, and deposited for another person's behoof, with the party appearing as creditor, who was the granter's father (*t*).

§ 959. It cannot, therefore, be said that the law is settled as to

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(*m*) Napier *v.* E. Eglinton, 1671, M., 12,318. But parole of the payment was refused. (*n*) Douglas *v.* Lauder, 1631, M., 12,708. (*o*) Fordel *v.* Carriber, 1677, M., 12,324. (*p*) Williamson *v.* Tennant, 1627, M., 12,305.
(*r*) Scot *v.* Dishington's Crs., 1628, M., 12,305. (*s*) Laurie *v.* Drummond, 1673, M., 12,320. (*t*) Rutherford *v.* Rutherford, 1670, M., 12,318.

the admissibility of parole to overcome the presumption in favour of the grantee holding a deed conceived in favour of himself. It is thought, however, that the leaning of the decisions, as well as correct principle, warrants its admission wherever the allegation in regard either to the mode in which the name of the person holding a document has been inserted in it, or his possession of it has been acquired, involves fraud in him, or in the person through whom it came into his hands (*u*).[1]

V. *Presumption and Proof as to Delivery of Deeds found in the hands of a third person.*

§ 960. When a deed is found in the hands of a third person, the question, whether he holds it on behalf of the granter or of the grantee, is one of fact, depending on the evidence adduced in each case (*x*). There are, however, some rules fixing the burden of proof in certain circumstances.

§ 961. If the depositary is connected with one of the parties, he is presumed to hold the deed for that party. This, for example, is the case as to a deed in the hands of the private agent (*y*), or the

(*u*) This is the view of Mr Tait, Ev., 170. (*x*) The question may be tried by jury; Maiklem *v.* M'Gruther, 1842, 4 D., 1182. (*y*) Ersk., 3, 2, 43—Bell's Pr., § 23—L. Adv. *v.* Drummond, 1750, M., 4875; Elch., "Forfeiture," No. 15; Cr. and St., 503, S. C.—Irvine *v.* Irvine, 1738, M., 11,576; Elch., "Deathbed," No. 18, S. C.—Garden *v.* Pilmore, 1724, M., 3519—Byres *v.* Johnstone, 1626, M., 11,566.

[1] A party who, under the trust-deed of his wife, had power to nominate the individual for whom the trustees were to hold an estate, nominated his niece and her heirs. He afterwards executed a deed revoking that nomination, and nominating another niece. At his death the estate was claimed by the second nominee and by the representatives of the first nominee, who produced the first deed of nomination, which, they said, had been delivered to their ancestor, the first nominee, and had become a delivered irrevocable deed. And they maintained, on the authority of Erskine, iii, 2, 43 (referred to in § 956), that it could not be proved, except by writ or oath, that the deed was delivered for any other purpose than to confer an irrevocable right. But the Court allowed an issue, whether the deed was delivered; and the representatives of the first nominee stood pursuers of the issue. It was proved that the granter had handed the deed to his niece, the first nominee; but it was shewn that he was frequently intoxicated, and that his niece took charge of many of his papers for him, and that, when he revoked the first deed, he asked it back from his niece, the first nominee. The jury found for the defender, the party nominated in the second deed. The pursuer moved for a new trial, but his motion was refused; and it was observed from the bench, that the doctrine of Erskine was not to be taken without qualification; that much depended on the nature of the deed, and that frequently the whole circumstances required to be taken into consideration; M'Aslon *v.* Glen, 1859, 21 D., 511.

wife (*z*), of one party, or in the hands of his son, especially if the son acts as his father's factor (*a*).

§ 962. But this presumption will yield to contrary probabilities and proof. Thus, where a person delivered to his law-agent a letter acknowledging marriage with a certain woman, after she had seen and assented to its terms, the Court found that the agent held it as trustee for her, although he declared that his possession was on behalf of the husband (*b*). And where a bond of provision had been placed by the granter in the hands of his agent, by whom it had been recorded, the Court held it to be a delivered deed; the proof of that fact including several letters of the agent, and one of the granter, in which he treated it as delivered and irrevocable (*c*). In like manner, where a deed taking the granter obliged to pay certain sums to his wife, and contingently other sums to their children, had been deposited with her, and by her placed in the hands of a third person, who recorded it, the Court held it to have been delivered in favour of the children, chiefly because the wife's interest in the deed made the delivery effectual as regarded her, and it was not to be viewed as made for a partial purpose (*d*). Thus, also, while a servant of the granter of a deed is presumed to hold it for his master, the master's orders to deliver it to the grantee will be effectual, although he should have died without their being fulfilled (*e*).

§ 963. It is presumed that a neutral depositary holds an onerous deed for unconditional delivery to the grantee (*f*); but that he holds a gratuitous deed (and especially a bond of provision) for de-

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(*z*) L. Traquair *v.* E. Winton, 1668, 1 B. Sup., 546—Agnew *v.* Agnew, 1767, 5 ib., 431.

(*a*) Fairlie *v.* Dick's Crs., 1666, M., 12,278. (*b*) Hamilton *v.* Hamilton, 1842, 1 Bell's Ap. Ca., 736. See Turner's Crs. *v.* his Children, 1783, M., 11,582.

(*c*) Downie *v.* M'Killop, 1843, 6 D., 180. (*d*) Riddle *v.* Inglis, 1750, M., 11,577; Elch., "Husband and Wife," 34, S. C. There was considerable difference of opinion on the bench in this case. In another case the Court held a deed to have been partly delivered and partly undelivered; Mair *v.* Thoms, 1850, 12 D., 748, noticed *infra*, § 964. (*e*) Crawford *v.* Kerr, 18th November 1807, F. C.; M., "Moveables," Appx., No. 2, S. C. Here a debtor wrote a letter to his creditor inclosing the halves of some bank notes and a bill. He gave it to his servant, wafered and addressed, with orders to deliver it to a runner who took his letters to the post office. The servant put it beside the other letters for the runner, but the writer of it died early the next morning before the runner arrived; and the letter remained in his house. In a question between the creditor and a trustee (not judicially appointed) for other creditors, the former was preferred to both halves of the notes and to the bill. The Court proceeded both on the trustee's want of right, and on the unrecalled order to deliver.

(*f*) Ersk., 3, 2, 43—Bell's Pr., § 23—Tait Ev., 164; 166.

livery only in case of non-revocation, or on fulfilment of a condition (*g*). Thus, a bond of provision by a father to his children, which had been deposited by him with their maternal uncle to be kept for their use, was held to be undelivered and revocable (*h*). And the same view was taken as to a gratuitous disposition in favour of the grandchild of the granter, which had been deposited with one who had no connection with the disponee (*i*). Thus, also, a bond of provision in favour of the granter's daughter, found in the hands of his uncle, was held to have been deposited for the granter's behoof, and to have been revoked by his incurring debt (*j*). And where a deed of entail, in favour of the entailer as institute and of certain substitutes, had been deposited with a neutral person "for behoof of all concerned," the entailer was held to have right to redelivery for the purpose of revocation (*k*).

§ 964. Where the depositary is agent for both granter and grantee, he is presumed to hold for the latter, if the deed is onerous (*l*). Thus where an onerous deed by a mother in favour of her son, to take effect after her death, was found in the hands of her agent, who was also agent for the son and his commissioner during his residence abroad, and who held certain bonds of provision in consideration of which the deed had been granted, the Lord Ordinary (Moncreiff) held the deed to be delivered and irrevocable in favour of the son; and his Lordship's opinion seems to have been adopted both in the Inner House and House of Lords (*m*). In another case, the agent for both parties to an intended heritable security for £900 had possession of the bond; but although he had received the whole sum from the lender, he had paid only £669 of it to the borrower, to whom he had given a letter acknowledging that only that sum had been paid; the agent having died bankrupt, in a competition between the borrower and lender it was held that the bond was a delivered document only to the extent of the £669

(*g*) Ersk., ib.—Bell's Pr., ib.—Tait, ib.—correcting Stair, 4, 42, 8.

(*h*) L. Monymusk *v.* Pitarro, 1628, M., 11,566; 1 B. Sup., 247, S. C.

(*i*) Ker *v.* Ker, 1677, M., 8249—See *contra*, Allan *v.* Allan, 1681, 2 B. Sup., 7; 8 ib., 418, S. C. (*j*) Halwell *v.* Ly. Cuming, 1796, M., 11,583. With this case compare Fairlie *v.* Fairlie, 1630, M., 11,567, where a gratuitous assignation by a mother to her son, having been deposited unconditionally in the hands of his wife's father, was held as delivered and irrevocable. Here the depositary was only connected remotely with the granter; while in Halwell *v.* Ly. Cuming he was more nearly related to him than to the grantee. (*k*) L. Lindores *v.* Stewart, 1714, M., 7735. The prohibitory and other restricting clauses were directed against the entailer, as well as against the substituted heirs. (*l*) Bell's Pr., § 28; Tait, 165.

(*m*) Stewart *v.* Stewart, 1833, 11 S., 327; affd., 1 Bell's App. Ca., 796.

received by the borrower, and that as to the balance the agent held the deed undelivered for behoof of that party (*n*). The Court considered that if no part of the money had been paid to the borrower, the depositation would have been regarded as for his behoof for delivery to the lender on payment; whereas, if all the money had been paid, the depositation would have been regarded as for behoof of the latter. Accordingly, as the payment had been partial, the Court (but with considerable doubt) held that the delivery corresponded to it.

But the depositation of a gratuitous deed with the agent for both parties is presumed to have been made for the purpose of delivery in case only of non-revocation (*o*). Thus where a husband and wife executed a joint settlement, mutually bequeathing all their effects to the survivor; and the wife, when her husband was on deathbed, executed a deed which, proceeding on the narrative that she granted it in compliance with his wish, conveyed to his relations a portion of the estate under burden of her liferent; this deed, having been produced by the agent for both spouses, was held to be undelivered and revocable (*p*).

§ 965. The presumptions noticed in the preceding sections are not absolute rules of law. They merely fix the burden of proof in what is a question of fact, depending on the circumstances of each case (*r*). Accordingly, in an action of damages by the grantee under a gratuitous deed against the agent for both parties, on account of his having refused to deliver it, where the defender pleaded he had held it on behalf of the granter to whom he had returned it; evidence *prout de jure* having been led for the pursuer; the jury found that the deed had been deposited for his behoof, and that the defender had wrongfully refused delivery (*s*). In another case, a gratuitous bond by a person to his brother, deposited with the law-agent for both parties, was held to have been delivered and irrevocable; evidence having been led which embraced payments by the agent to the grantee in implement of the deed, and the understanding of the granter and the agent that the deed was irrevocable (*t*). Thus, also, where an assignation by a father to his daughter, re-

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(*n*) Mair *v.* Thoms, 1850, 12 D., 748. The deed had been given up improperly to the lenders by the agent's heirs; but that was held not to affect the question.

(*o*) Tait, 165—*Supra*, § 963. (*p*) Brownlee *v.* Waddell, 1831, 10 S., 39.

(*r*) Maiklem *v.* M'Gruther, 1842, 4 D., 1182, per L. Just.-Clerk Hope—Tait Ev., 165.

(*s*) Maiklem *v.* M'Gruther, *supra*. (*t*) Ramsay *v.* Maule, 1828, 6 S., 343; affd., 4 W. S., 58. See Turner's Crs. *v.* his Children, 1783, M., 11,582.

serving his liferent, and containing a clause of warrandice from fact and deed, but no power to revoke, had been deposited by him with a third party, in terms of a clause in the deed, "to remain during the granter's lifetime, or while he should have use for the bond assigned, for security of his reserved liferent, and to be delivered after his death to the daughter" for her own purposes; the assignation was sustained as a delivered deed in her favour, in competition with a subsequent deed of revocation by the granter (*u*). Here the presumption, that the depositary held for the granter of the deed, was overcome by the terms of the depositation, which inferred delivery for behoof of the assignee. In like manner, where an onerous disposition had been placed by the seller in the hands of a conveyancer, in order that a charter might be prepared in favour of the purchaser, the disposition was held not to have been delivered, and *locus penitentiae* was allowed (*x*). The special purpose of the depositation qualified its effect, and prevented it from inferring delivery.

§ 966. Proof *prout de jure* is admissible to show whether a depositary holds for the granter or grantee (*y*). But parole was excluded where an assignation granted by one as factor for his father in satisfaction of a debt, having been found in the son's custody, was alleged to have been delivered to the assignee and then redelivered by him to the son as his agent (*z*). Here, however, as the depositary had signed the deed, his possession was like that of the granter; and the case came within the rule that parole is not admissible to prove that a deed in the hands of the granter has been delivered (*a*).

§ 967. When the granter of a deed in the hands of a depositary alleged that it lay there for conditional delivery, the Court have repeatedly held that both the existence and the terms of the condition might be proved by the depositary's oath; *quia deponendo apud eum ejus fidem secuti sunt* (*b*). Nor does it seem that the competency of the depositary's oath is limited to proving the terms of the condi-

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(*u*) Sinclair *v.* Purves, 1707, M., 11,572. (*x*) Byres *v.* Johnstone, 1626, M., 11,566. This case comes also under the rule noticed *supra*, § 961.

(*y*) See Collie *v.* Pirie's Tr., 1851, 13 D., 506—Maiklem *v.* M'Gruther, *supra*—Norvel *v.* Ramsay, 1786, M., 12,290. (*z*) Fairlie *v.* Dick's Crs., 1666, M., 12,278.

(*a*) *Supra*, § 952. (*b*) Learmonth *v.* Alexander, 1624, M., 12,376—Hay *v.* Wright, 1624, M., 12,378—Hay *v.* M'Michael, 1631, 1 B. Sup., 71—Guthrie *v.* Fentrie, 1649, ib., 393—Garden *v.* Pilmore, 1724, M., 3519—See also Cowan *v.* Ramsay, 1675, M., 12,379—M'Ghie *v.* L. Yester, 1629, M., ib.—Douglas *v.* Lauder, 1631, M., 12,703—Auld *v.* Smith, 1684, 2 B. Sup., 57.

tion, where the existence of a condition of some kind is proved by the writ or oath of the grantee; although that view is supported by Lord Stair's opinion (*c*). But when a mutual deed is found in the hands of a depositary, one of the parties may not prove by that person's oath that it lay with him for conditional delivery; because a mutual deed is effectual, although not delivered (*d*). The Court, also, refused to admit the depositary's oath in contradiction of a writing under his hand and that of the parties, containing the terms of the depositation (*e*).

§ 968. In general, witnesses (other than the depositary) are inadmissible to prove that a depositation was made for conditional delivery (*f*). But they were admitted in an action by the granter of a deed against the depositary for reparation of the damages sustained by his having delivered it without the granter's authority, and without the conditions on which delivery was to have been made having been performed (*g*).

§ 969. The decisions have not been uniform as to the mode of proving that the depositary of a deed received from the granter directions to cancel it. In one case, where the creditor in a bond sued the granter for payment, the latter defended himself on the ground that the deed had been executed by him as part of an arrangement with his father, whereby he undertook to pay the debt to which the bond applied, and which had originally been incurred by his father; that with a view to this arrangement, his father and he had signed, and placed in the hands of a notary, two blank papers, in order that they might be filled up with a bond and disposition; that before delivery he and his father had resiled, and desired the notary to cancel and destroy the documents; but that, instead of doing so, the notary had given them to the pursuer after an interval of eight or nine years. The parties having differed as to the mode of proving these averments, the Court, before answer, ordained the notary and witnesses inserted to be examined *ex officio;* and on their depositions proving the averments, the question of law

(*c*) Stair, 4, 42, 8. The law was so laid down in the first and second editions, but altered in the later edition, of his Lordship's treatise under another head; from which it would seem that the views of that high authority had undergone some modification on the point; see More's ed. of Stair, 1, 13, 4. (*d*) Crawford *v.* Vallance, 1625, M., 12,304—Stair, 1, 13, 4. But see *contra*, Drummond *v.* Campbell, 1662, M., 12,309.

(*e*) Cowan *v.* Ramsay, 1675, M., 12,379—Stair, 1, 13, 4. (*f*) Stair, *supra*—Hay *v.* Wright, 1624, M., 12,379—Crawford *v.* Vallance's Heirs, 1625, M., 12,304—Ker *v.* Home, 1611, M., 12,301, 2—Mallach *v.* Graham, 1673, 1 B. Sup., 681—But see Auld *v.* Smith, 1684, 2 B. Sup., 57—Collie *v.* Pirie's Tr., 1851, 13 D., 506.

(*g*) Ker *v.* Home, 1611, M., 12,301—Stair, 1, 13, 4—See *supra*, § 965.

arose, whether the depositation of writs could be proved any other way than by the oath of the party in whose favour the writs were conceived, he having the same in his hands. The Lords found, that seeing these two writs were produced neither by the father nor by the son, by and to whom they were respectively granted, but by a third party in whose favour a clause therein was conceived, in that case, the depositation was provable by the writer and witnesses inserted; and on considering their testimony found the writs null (*h*). Again, where the children of a deceased person claimed from his eldest son and heir payment of provisions for which the heir had been liable under a bond of provision by the father, and bond of corroboration by himself, both of which deeds had been in the hands of the father, but had been abstracted from his repositories; in an action of proving the tenor of the bonds, the heir having alleged that the father, when on deathbed, gave his wife warrant to take and cancel the deeds, the Court allowed the averment to be proved by the oaths of the wife and other witnesses (*i*). In another case where a question arose as to the effect which cancelling a deed had upon a similar deed executed in lieu of it, the cancelled deed appeared with the subscriptions torn from two of the pages; and the only explanation given regarding its condition was by the granter's law-agent, who swore that the granter handed it to him, and desired him to cancel it and make out a new deed in terms which had been previously arranged; that he accordingly prepared the new deed; that on its being executed he cancelled the previous deed by cutting off the signatures; and that he did so in his own office on his return from the granter's house, but when the granter was not present. A great deal of discussion ensued as to the effect of the cancelled deed; but both the Court and the Bar treated the cancellation by the agent as equivalent to that of the granter, although there was no proof that he acted by her orders, except his own statement and the inference arising from the circumstances of the case (*k*).

(*h*) Drummond *v.* Campbell, 1562, M., 12,309. (*i*) Chisholm *v.* Chisholm, 1678, M., 12,320. (*k*) Mure *v.* Mure, 1st June 1813, F. C. With this case compare Cunningham *v.* Mowat's Tr., 1851, 13 D., 1376 (*ex parte*), where the agent of a truster had deleted the subscriptions to a deed of instructions and marked it "cancelled, superseded by new deed of instructions." In an action of proving the tenor of the deed he swore that he had acted without the truster's orders, under a mistaken impression that the first deed had been superseded by the second. The Court gave effect to this statement, and holding the *casus amissionis* to be proved, they gave decree of proving the tenor.

§ 970. These cases proceed on the footing that the alleged orders by the granter of a deed to some one to cancel it may be proved *prout de jure* so as to infer revocation; and in the last mentioned case it seems to have been assumed that the fact of a deed being found in the hands of a depositary cancelled, with his oath that he cancelled it by the granters' orders, is sufficient to render it ineffectual. But in several cases the Court proceeded much more strictly as to the mode of proving the direction to cancel.

§ 971. In an action at the instance of Sprinkel's natural daughter against his heir for 5000 merks, contained in a bond granted by the heir, the defender, on a reference to his oath, admitted that he had granted a bond in favour of the pursuer at the desire of Sprinkel; but added that the deed had never been delivered, that it was so far from being effectual that, by the express order of Sprinkel, he was not to deliver it to the pursuer without Sprinkel's warrant; and that Sprinkel ordered him to destroy the bond on account of not being pleased with the pursuer's conduct, and left her a legacy instead of it, which the pursuer had paid. The defender supported the qualification in his oath by letters from Sprinkel to the same effect. But the Court, by a plurality, decided that the qualification was extrinsic to the reference; and they accordingly found the pursuer entitled to the sum due under the bond as a subsisting deed. An attempt, which the defender made by suspension, to have the case reconsidered, was frustrated on a point of form, although some of the judges were of opinion that the reasons urged by him were unanswerably relevant (*l*). Fountainhall observes, "that it was thought the Lords went too far in this decision; and Dirleton seems to be of a contrary opinion" (*m*). In another case, a daughter sued her mother for exhibition and delivery of a bond of provision granted by her father in her favour; and the mother, on a reference to her oath, stated that the father deposited the deed with her for delivery on condition of the daughter marrying with her consent and behaving herself properly, that he put it absolutely in the deponent's power to give the daughter such sum as she might think fit; and that, the daughter having made a run-away mar-

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(*l*) Maxwell *v.* Maxwell, 1675, M., 12,822. In Carse *v.* Kennedy, 1714, M., 13,247, a party being sued in an action of exhibition of his contract of marriage, deponed, on a reference to his oath, that it had been granted by him in minority, without consent of his curators, and he had therefore cancelled it. The Court held that the qualification was extrinsic to the reference. (*m*) In Forbes *v.* Ly. Culloden, 1712, M., 13,236.

riage, the deponent executed her husband's will and command by burning the deed. The Court considered that the mother ought to have preserved the bond entire, and should have stated what the granter's directions were when she was sued for exhibition of it. By a plurality they held the cancelling to be unwarrantable; and, as the deed could not be restored, they found the mother liable in damages; *loco facti imprestabilis succedit damnum et interesse* (*n*). Again, in an action for payment of a legacy alleged to have been bequeathed under a will which had been deposited with the defenders, but had been abstracted, and for exhibition of the deed, one of the defender's deponed that the deceased, shortly before death, placed the will in his hands, desiring him to do with it what he pleased, and that, about the time of the death, he burnt it in consequence of orders from the testator. The question being then raised as to the effect of this qualified oath, the Court held that there was sufficient evidence that the will had existed after the testator's death, and had been unwarrantably destroyed by the defender referred to; and they accordingly sustained the action for payment of the legacy (*o*).

§ 972. In accordance with these decisions was that pronounced in a modern case, where two deeds of settlement and entail, containing clauses dispensing with delivery, had been deposited with the granter's agent in a sealed packet bearing a docquet written by the agent and signed by the granter, but not probative; which docquet directed that the deeds should be destroyed unopened in case of the granter dying before a certain day. His death having occurred before that time, two actions were raised against the agent; one by the heir-at-law, concluding that he should produce the deeds for cancellation; and the other by the persons favoured by the deeds, concluding to have the packet opened and the deeds recorded. The actions having been conjoined, the heir-at-law maintained that the docquet intercepted delivery, and that the terms of depositation could be proved by the docquet and the depositary's oath; while the granters pleaded that, as the deeds contained clauses dispensing with delivery, the docquet was in effect a deed of revocation, and being improbative, was ineffectual. The Court adopted the latter view, and directed the deeds to be recorded (*p*).

Again, in an action (*r*) against testamentary trustees for proving

(*n*) Forbes *v.* Ly. Culloden, 1712, M., 13,286. (*o*) Fisher *v.* Smith, 1771, M., 9366. (*p*) Logan *v.* Logans, 1823, 2 S., 253. (*r*) Falconer *v.* Stephen, 1848, 11 D., 220, 1338.

the tenor of a codicil to a trust-deed, the defenders alleged that it had been deposited with one of their number (who had been the truster's agent, and was a residuary legatee), and that it had been destroyed by him after the truster's death, and in terms of the truster's directions. A proof of the *casus amissionis* was thereupon allowed; in which the depositary, when examined as a haver, swore that he had burnt the deed; but was not allowed to be cross-examined as to the truster's alleged directions; such an examination being considered foreign to a deposition as a haver. The case having then been advised on the proof, the Court found the tenor of the document to be proved, reserving all objections to its effect, and thus leaving it open to the parties interested to prove afterwards that the granter of the deed ordered that it should be cancelled. From the point having occurred in an action which was raised only for the purpose of procuring a judicial copy of the deed as it existed before the act of cancellation, the question as to the mode of proving the order to cancel was not before the Court for decision. Some of the judges, however, adverted to it. Lord Mackenzie observed, "Suppose a man in his lifetime gives another a testamentary document to destroy, and it is accordingly destroyed, then the beneficiary comes forward and denies the authority to destroy it. That is a very good plea; but would the *onus* not lie on him to prove so very special a *casus amissionis*, as that the deed was tortuously destroyed?" His Lordship accordingly reserved his opinion on the question of proving the direction to cancel. The Lord President (Boyle) said, "my opinion is that it was the duty of Mr Davidson (the depositary) to have preserved the deed. If he did not fulfill his instructions during the lifetime of the truster, he had no right to do it at all." Lord Fullerton entered at some length into the competency of sustaining a cancellation, merely on the oath of the depositary, that he had been directed to cancel. His Lordship observed, that the ordinary presumption in the case of testamentary deeds is, that they are in the hands of the depositary for behoof of the testator, and, consequently, of the parties favoured by them; "And the plea of the defenders really comes to this, that a party having the custody of such a deed extant at the death of the testator, can discharge himself of the consequence of destroying it by the simple statement that it was put into his hands not to be kept, but to be destroyed; and that his admission of the destruction of the deed cannot be separated from the qualification tacked to it, that it was put into his hands for that purpose. I should hesitate to admit any such plea; which would, in truth, place at the mercy

of the custodier any testamentary deed with which he might happen to be entrusted. I think, on the contrary, that, from the moment of the testator's death, and the subsequent vesting of all the rights created by his testamentary writings, the custodier had no warrant to destroy the deed at his own discretion. Viewed as a question of mandate, the mandate fell at the death of the mandant." His Lordship added that, notwithstanding the action then before the Court, it would "be quite competent for the defenders to prove, if they can, that the deed was put into the hands of Mr Davidson for the purpose of being destroyed; and that he still is entitled and bound to destroy it."[2]

§ 973. From these cases, then, it appears that a deed of a testamentary nature will not be held as revoked merely on the depositary's oath that it was placed in his hands with directions to cancel it; and that his having in point of fact cancelled the deed does not alter the legal position of the parties maintaining its subsistence. Whether the same rule applies to a deed requiring delivery does not appear. It would perhaps be held that the *onus probandi* is reversed in such a case; because the party founding on the deed as delivered to him through the depositary would have to prove that fact, whereas the effect of testamentary deeds, deeds dispensing with delivery, and, in general, bonds of provision, does not depend on any such inquiry.

§ 974. The granter's orders to cancel may not be proved by witnesses deponing merely to his verbal directions; such evidence being inadmissible to modify or cut down a formal writing. But it is thought that they may be inferred (like revocation in any other way) from the real evidence of the granter's conduct, and from other facts and circumstances, which cannot reasonably bear a different construction (*s*).

VI. *Presumption and Proof as to Delivery of Deed taken in name of a third person.*

§ 975. Where a party entitled to take a right or obligation in his own name substitutes that of another person, there is some difficulty in determining how far delivery is required to make the

(*s*) See *supra*, § 161, *et seq.*, § 624, *et seq.*

[2] See Winchester *v.* Smith, 1863, 1 Macph., 685.

right effectual, and what control the party by whom the deed has been so taken retains over it.

§ 976. If the deed has been followed by delivery to the third person, or by publication, it is effectual and irrevocable as a *jus quaesitum tertio*. Thus where a person, buying heritable property, took the disposition in favour of himself and his wife in liferent, and his daughter in fee, and sasine followed in favour of them all, the daughter's right was held to be complete and irrevocable (*t*). Where a party, in right of certain teinds, granted bond to his authors, agreeing (*inter alia*) to exact only a limited sum from a certain heritor, and the bond was registered, the obligation was held to be effectual to the person favoured by it, notwithstanding a discharge from those by whom the bond had been taken (*u*). So an assignation taken by a person in name of his daughter, having been followed by intimation, and by her executors making up a title to it by confirmation, was held not to have been extinguished by a discharge executed by the father (*x*). And a deed of entail by a person in favour of himself in liferent and his son as fiar, with certain substitutes, having been followed by registration and feudal investiture, was found to be valid in favour of the substituted heirs, whose rights were held not to be affected by a renunciation granted by the entailer and the institute (*y*).

On the same principle, where a father in selling land took the purchaser bound to grant bond for the price to himself in liferent and to his sons in fee; and where he caused the sons to sign a postscript agreeing not to call up the money for some years; but no bond was delivered on the one hand, or disposition on the other;—the Court held that the fee was vested absolutely in the sons, in consequence of the father having made them parties to the transaction (*z*).

§ 976*. But if a person takes a right in name of another, and retains possession of the deed, instead of making it public or delivering it to the grantee, he reserves control over it, and may cancel it, or take a new right in name of himself or of another person, as he chooses. The right of the grantee in such a case corresponds to a right under a *mortis causa* deed, granted by the person who took

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(*t*) M'Intosh *v.* M'Intosh, 28th January 1812, F. C. (*u*) Renton *v.* Ly. Aiton, 1634, M., 7721; 1 B. Sup., 852, S. C. (*x*) Trotters *v.* Lunday, 1667, M., 11,498. With this case compare Cockburn *v.* L. Craigievar, *infra*, (*f*).

(*y*) Gordon *v.* Macculloch, 1771, M., 15,579. (*z*) Spence *v.* Ross, 1826, 5 S., 17.

the right in question in his name. The law is so laid down by the Court in an old case already cited (*a*), and by Lord Meadowbank (*primus*) in the modern case of M'Intosh *v.* M'Intosh (*b*). On this principle, also, where a person lending money, took the bond payable to his son David, whom failing to his own heirs, but kept the document in his hands without delivery to his son; George, who was David's younger brother and executor, was held not to have action against the father for the sum in the bond, the Court considering it to be within the father's control (*c*). Thus, also, where a father on conveying certain property to his eldest son, took from him bonds of provision in favour of the younger children, the father's cancelling of these was held to have extinguished them (*d*). And on reporting a case on this subject, Lord Kames has observed, "When a man lends a sum in name of a child *in familia*, delivery of the bond to the father, has not naturally any other signification than that the bond, which comes in place of the money, is to be under his power, as the money formerly was" (*e*).[3]

§ 977. The Court have sometimes regarded a deed taken by a person in a third party's name, but retained by him without delivery, in the light of a trust, holding that the name interposed had merely been borrowed by the real party, without his intending to impair his own right. This was held in regard to an assignation which a person took in name of a third party, and intimated to the debtor, but not to the nominal assignee (*f*). The intimation to the debtor, although necessary for completing the right of the party entitled to the debt, whoever that might ultimately be, was held not to foreclose the real assignee from maintaining his latent right. And where a person purchasing heritage took the disposition in name of a third party, but retained possession of it, the Court held

(*a*) Trotters *v.* Lundy, *supra*. (*b*) M'Intosh *v.* M'Intosh, *supra*.

(*c*) Hill *v.* Hill, 1755, M., 11,580. (*d*) Ross *v.* Bain, 1717, M., 11,505. The contrary decision of Hamilton *v.* Hamilton, 1741, M., 4137; 11,576; Elch., "Provision" to heirs, No. 5; S. C., is thought to be erroneous. See also, *contra*, Sinclair *v.* Sinclair, 1682, 2 B. Sup., 20. (*e*) Hill *v.* Hill, 1755, M., 11,580.

(*f*) Cockburn *v.* L. Craigievar, 1672, M., 11,493. The distinction between this case and Trotters *v.* Lundy, *supra*, § 975 (*x*), is very narrow.

[3] When a receipt for money advanced bore that the money was to be placed to the account of the trustees of the wife of the person who advanced the money, but where, in fact, it was placed to the credit of that person himself, with his knowledge, and without objection by him, the trustees of his wife were held to have no title to the money; Drysdale *v.* Ritchie, May 1868, 1 Macpherson.

that it was within his control as the real proprietor, and could therefore be disposed of under his deed of settlement (*g*).

§ 978. But where a deed of conveyance or obligation is drawn in name of a creditor of the person entitled to take it in his own name, it is effectual in favour of the creditor, although lying in the debtor's hands undelivered (*h*). This rule corresponds to that above noticed, whereby a deed which a person is under an obligation to grant is effectual to the grantee without delivery (*i*).

§ 979. When a deed taken in name of a third person is placed in the hands of a depositary, the question, whether it is held for the grantee or for the person by whom the depositation was made, depends on the circumstances and the evidence in each case. Accordingly, where a note for money advanced by A, taken in name of "B, son of A, for behoof of his (B's) children," had been deposited by A with a friend, who held it at the time of A's death; and who declared that for several years A had been in the habit of depositing promissory-notes with him for safe keeping, that he considered himself bound to re-deliver them whenever A chose to call for them, and that he had repeatedly given them to A on his demand, and had received new notes in their place;—in an action by the widow and other children of A against B, it was held that the note had been deposited for behoof of A, who might have destroyed it at any time during his life, and therefore that his allowing it to remain in the depositary's hands unrecalled and undelivered, showed it to be a testamentary bequest, which could not affect the *jus relictae* or *legitim* (*k*). Thus, also, where a party lending money, took the bond payable to trustees for behoof of his grandchild, and deposited it with one of the trustees, the Court allowed a proof before answer on all facts relevant to the preparation and delivery of the deed; and on considering the proof, found that the deed was delivered and irrevocable in favour of the grandchild (*l*). In another case, where a bond for the price of land had been taken payable to the seller in liferent, and to his children *nominatim* in fee,

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(*g*) Balvaird *v.* Latimer, 5th Dec. 1816, F. C. (*h*) Nimmo, 1627, M., 7740—Ly. Pitmedden *v.* Gordon, 1707, M., 7727—Bayne *v.* M'Millan, 1677, M., 11,495—Carmichael *v.* Wilson, 1714, M., 7741—Goldie *v.* Aitken, 1729, M., 7742—Ogilvie *v.* Ker, 1664, M., 7740—*Contra*, Hissleside *v.* Littlegill, 1685, M., 11,496, where a debtor having granted assignation to his creditor, and caused it to be intimated, but retaining the assignation and instrument of intimation, was held not to have been divested until delivery of the assignation to the creditor. But this was "not without scruple."

(*i*) *Supra*, § 943. (*k*) Milroy *v.* Milroy, 1808, Hume D., 285. See some analogous cases, *supra*, § 369. (*l*) Collie *v.* Pirie's Tr., 1851, 13 D., 506.

and had been delivered by the purchasers' agent to the person who had acted professionally for the seller in the transaction, the Court held that it had been delivered in favour of the children, and that it did not fall to their father's creditors (*m*). But it may be doubted whether the depositation with the agent for a father ought to be considered as delivery for behoof of the children, unless it were proved to have been so intended.

§ 980. Another rule in this class of cases seems to be, that when one of the parties in a bilateral contract agrees to a certain obligation in favour of a third person, there is a *jus quaesitum* in that person upon the execution of the contract, without delivery to him or any one on his behalf (*n*). Thus in a contract of excambion a clause obliging one of the parties not to remove tenants from the ground acquired by him, was sustained in favour of the tenants, although they had not been parties to the deed, and it had not been delivered to any of them (*o*). Again, in a marriage-contract, where the wife was provided in a certain annuity, a small yearly sum payable out of it to the stepmother of the husband was held on the wife's survivance to be an effectual burden on her jointure (*p*). But where a marriage-contract made certain provisions in favour of the wife's children by a former marriage, these were held to be revocable at the will of the spouses jointly (*r*).

It must be added that there is considerable conflict in the decisions as to *jura quaesita tertiis*. One learned judge says it is "perhaps an impossible task" to reconcile them (*s*).

VII. *Presumption and proof as to date of Delivery of Deed.*

§ 981. In general, the delivery of a deed found in the hands of the grantee, or of a person for his behoof, is presumed to have been made at the date of the deed (*t*). Thus an assignation in favour of the granter's married daughter, dated (but not intimated) during her marriage, having been found in her hands after the dissolution of the marriage, was presumed to have been delivered during its

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(*m*) Turner's Crs. *v.* his Children, 1783, M., 11,582. (*n*) Stair, 1, 10, 5. This is analogous to the rule that bilateral contracts are effectual to the parties without delivery. *Supra*, § 944. (*o*) Wood *v.* Moncur, 1591, M., 7719.

(*p*) Warnock *v.* Murdoch, 1759, M., 7730; questioned in More's Notes, 62.

(*r*) Tait *v.* Pollock, 1738, M., 7728. (*s*) Per L. Ivory (Ordinary) in Collie *v.* Pirie's Tr., 1851, 13 D., 506. (*t*) Stair, 1, 5, 6 (4); and 1, 7, 14 (8)—Ersk., 3, 2, 43—Bell's Prin., § 23—Tait, 171.

subsistence, and, therefore, to have fallen under her husband's *jus mariti* (*u*). And bonds of provision by a brother in favour of his sisters, in corroboration and satisfaction of previous bonds granted by their father, and of their rights of *legitim*, having been delivered to their mother on their behalf, were presumed delivered of their respective dates, in a question with a subsequent heir of entail (*x*).

§ 982. This presumption yields to contrary inferences and proof. It does not apply to bonds of provision or other deeds by a father to his children, when competing with debts by the granter; so that the former, although earlier in date, will not be sustained, unless they be proved to have been the first delivered (*y*). Were it not so, creditors might suffer from latent deeds retained by their debtor with the power of revocation. This rule was applied where a party founding on bonds of provision raised a claim against the Crown as in right of the granter's forfeited estate (*z*); and where children competed on bonds of provision with creditors whose debts were later in date (*a*). So a younger son, grantee in an heritable bond executed by his father under a faculty reserved in disponing the lands in his eldest son's marriage-contract, was required to prove that the bond was delivered before a discharge of the faculty, which had been granted by the father in favour of the eldest son (*b*). Thus, also, one holding a disposition from his father was required to prove delivery, prior to the contraction of debts to his father's creditors, on which they had led adjudications after the son had taken infeftment (*c*).

It may, however, be proved by parole that bonds of provision were delivered before the father's debts were contracted (*d*).

CHAPTER X.—OF THE ACCEPTANCE OF DEEDS.

§ 983. As delivery is necessary for making a deed effectual against the granter, so the grantee is not bound by the obligations

(*u*) Scott *v.* Dickson, 1663, M., 5799. (*x*) Gordon *v.* Maitland, 1757, M., 11,165, and 5 B. Sup., 431; affirmed as Forbes *v.* Gordon, 1760, 2 Pat. Ap. Ca., 43.

(*y*) Stair, 1, 5, 6 (4); and 1, 7, 14 (8)—Tait, 171. (*z*) Fraser *v.* L. Advocate, 1754, M., 17,008. (*a*) Inglis *v.* Boswell, 1676, M., 11,567.

(*b*) Chiesly *v.* Chiesly, 1701, M., 11,571. (*c*) Simpson *v.* Finlay, 1697, M., 11,570. (*d*) Stair, *supra*—Inglis *v.* Boswell, 1676, M., 11,567.

with which the right is burdened, unless he has accepted the deed *cum omni onere* (*e*). This is the case whether the burdens are embodied in the deed, as the obligations on the vassal under a feu-charter,—or are inherent in the right conveyed, as the liabilities effeiring to shares of joint-stock companies.

§ 984. Acceptance may be either expressed by the grantee in a written or verbal declaration, or it may be exhibited by his acts, such as recording or taking infeftment on the deed, or otherwise using it as his own (*f*). One who was present at a general meeting of creditors, at which a trust-deed offered by the debtor was agreed to, was understood to have acquiesced in the resolution of the meeting, and to be tied down to acceptance of the deed; because, although he had not actually approved of it, he had not declared against it (*g*). But the grantee's merely receiving the deed ought not to infer acceptance; because, where the granter does not tie him down to acceptance, it may be presumed that he left him to deliberate whether he would accept or not (*h*). Yet acceptance may arise from the grantee wittingly retaining the deed for a length of time without repudiating it; the period varying with the nature of the deed and the circumstances of the case (*i*).

§ 985. Express acceptance may be proved by the grantee's writ or oath. Mr Tait (*k*) thinks that, being a *nuda emissio verborum*, it may not in general be proved by witnesses. But there is no decision on the point; and the objection to parole seems to go to the credibility of the evidence rather than to its competency. Where the acceptance is implied from the grantee's acts, these may be instructed *prout de jure* (*l*), unless in their nature they require written proof, as infeftment, registration, and the like.

§ 986. Acceptance is only requisite for making the deed effectual against the grantee. The granter is bound by delivery, although made without the grantee's knowledge or consent (*m*). Yet if a person to whom a deed has been transmitted, as on behalf of the grantee, has refused to receive delivery for him, and the granter has not delivered the deed to another person in his stead, the deed will be held as undelivered (*n*).

The rules as to the constitution of contracts by offer and acceptance are noticed above (*o*).

(*e*) Ersk., 3, 2, 45—Tait Ev., 172. (*f*) Ersk., *supra*—Tait, *supra*.

(*g*) Case mentioned (but without the parties' names) by Ersk., *supra*—See also Lea *v.* Longdale, 1828, 6 S., 350. (*h*) Ersk., *supra*. (*i*) Tait, *supra*.

(*k*) Tait, *supra*. (*l*) Ersk., *supra*—Tait, *supra*. (*m*) Stair, 1, 10, 5—Borthwick *v.* Lawrie, 1686, M., 7735. (*n*) Glendinning *v.* Wyllie, 1634, M., 16,992, noted *supra*, § 947. (*o*) *Supra*, §§ 546, 556.

CHAPTER XI.—OF STAMPS TO PRIVATE WRITINGS.

§ 987. Engrafted on the law regarding the authenticity of deeds are the statutory rules which require that the material on which certain deeds and instruments are written shall bear an appropriate government stamp. The statutes on this subject are very numerous (*a*); and are continually fluctuating with the exigencies of the public service. In the following sections they will be noticed only in their immediate bearing upon the law of evidence.

§ 988. The stamps required for private writings are chiefly regulated by the act 55 Geo. III, c. 184, with the modifications introduced by the acts 13 and 14 Vict., c. 97; 16 and 17 Vict., c. 59; 16 and 17 Vict., c. 63; and 17 and 18 Vict., c. 83. The schedules annexed to these statutes must be referred to for their details. Those appended to all the stamp acts are digested in a useful "Table of the whole Stamp Duties exigible in Scotland" (*b*).[1]

§ 989. The stamp is usually impressed upon the paper on which the deed is written. But stamps for receipts (*c*), policies of assurance (*d*), and drafts or orders for payment of money to the bearer or to order on demand (*e*), may also be impressed on adhesive stamps affixed to the document; such stamps requiring to be cancelled by the signature or initials of the person who makes or gives the document (*f*).[2] The duties upon foreign[3] bills negotiated in

(*a*) There are about three hundred stamp acts, and the most of these have been partly repealed and modified or re-enacted. The consequence is, that the stamp laws are involved in extreme, and in some respects almost inextricable, confusion.

(*b*) Third edition, ann. 1853, with a continuation, ann. 1854, containing 17 and 18 Vict., c. 83, published by Wm. Blackwood and Sons of Edinburgh. (*c*) 16 and 17 Vict., c. 59, § 8. (*d*) 16 and 17 Vict., c. 63, § 10. (*e*) 16 and 17 Vict., c. 59, §§ 3, 4. (*f*) 16 and 17 Vict., c. 59, § 4—Ib., c. 63, § 11.

[1] The principal subsequent statutes on stamps are 19 and 20 Vict., c. 81; 21 and 22 Vict., c. 20; 23 and 24 Vict., c. 15; 23 and 24 Vict., c. 111; and 24 and 25 Vict., c. 91. See Muir's Stamp and Tax Office Manual, 1861.

[2] The following documents, besides those mentioned in the text, may be stamped by adhesive stamps:—Tacks and Transfers under the Dwelling Houses Act (18 and 19 Vict., c. 88, § 21); Extracts from Registers of Births, &c.; Delivery Orders relative to Goods in Bond (23 and 24 Vict., c. 15, § 8); Contract Notes for the Sale of Government Stock, or of Stock of Joint-Stock Cos. (23 and 24 Vict., c. 111, § 7); certain Policies of Insurance for small sums, and certain Drafts on Bankers (23 and 24 Vict., c. 111, §§ 9, 17, 18); Leases of Furnished Houses for a shorter period than a year (24 and 25 Vict., c. 21, § 14); Proxies to be used in voting at meetings of Joint-Stock Cos., of Heritors in Parochial Matters, and of Charitable Institutions (19 and 20 Vict., c. 81, § 1; 24 and 25 Vict., c. 91, § 27). As to cancelling adhesive stamps, see 24 and 25 Vict., c. 91, § 33.

[3] Or foreign drafts or orders; 23 and 24 Vict., c. 15, § 13—or foreign promissory-notes; 23 and 24 Vict., c. 111, § 5.

this country are only levied by means of adhesive stamps; and the person who negotiates the bill must cancel the stamp by writing upon it his name or the name of his firm, with the date when he does so (*g*).[4]

§ 990. Bankers in Scotland, instead of using stamps for their promissory-notes payable to the bearer on demand, or their bills of exchange, may compound and agree with the Treasury for a composition in lieu of such stamps; and upon their doing so it is "lawful for them to issue and re-issue all notes, and to draw all such bills, for which such composition shall have been made, on unstamped paper" (*h*).[5]

In order to facilitate the transfer of bonds and mortgages given by public companies under Acts of Parliament authorising them to borrow money, it is enacted, that if, on the original making and issuing of such deeds, and before any transfer of them, they shall be stamped with a duty equal to three times the *ad valorem* duty chargeable on them by law, and over and above the said *ad valorem* duty, then every transfer or assignment thereafter made by indorsement thereon shall be exempt from the stamp-duty, to which it would otherwise have been subject (*i*).[6]

§ 991. If the stamp which a document bears is not applicable to the kind of deed, but is sufficient in amount, it is effectual "except in cases where the stamp" "shall have been specially appropriated to any other instrument, by having its name on the face thereof" (*k*). Adhesive stamps for receipts, and for orders or drafts of money payable to the bearer on demand, may "be used for the purpose of denoting the like amount of duty, either on a receipt or on such draft or order as aforesaid, without regard to the special appropriation thereof for the other of such instruments, by having its name on the face thereof" (*l*).[7] Bills of exchange which have

(*g*) 17 and 18 Vict., c. 83, § 8, 5—See *infra*, § 1002. (*h*) 16 and 17 Vict., c. 63, § 7. (*i*) 16 and 17 Vict., c. 59, § 14. (*k*) 55 Geo. III, c. 184, § 10. (*l*) 17 and 18 Vict., c. 83, § 10.

[4] See 23 and 24 Vict., c. 15, § 12.

[5] All drafts or orders for payment to the bearer on demand, drawn on a banker transacting business as such within fifteen miles of the place where such drafts or orders are issued, are chargeable with the stamp-duty of 1d. for each such draft or order; 21 and 22 Vict., c. 20, § 1. Previously such drafts or orders did not require a stamp.

[6] 24 and 25 Vict., c. 50.

[7] It was held that a document in the following terms,—"Received from A B the sum of £11, payable on demand," was a promissory-note, and required to be stamped as

been written on stamps of a wrong denomination may have the proper stamp affixed to them afterwards on payment of a penalty (*m*). Of course, a stamp of the proper denomination, but bearing a larger duty than the document requires, is effectual (*n*).

A deed upon a stamp of inadequate amount is equally inadmissible in evidence as one which is unstamped (*o*).

§ 992. Duplicates and counterparts of deeds for which a stamp-duty of five shillings and upwards (with progressive duty) is required may be stamped with a duty of five shillings for the first sheet of 2160 words, and a progressive duty of two shillings and sixpence for every 1080 words over and above the first 1080. But the duplicate or counterpart is not available, except in the case of leases, unless it be stamped with a particular stamp testifying the payment of the proper stamp-duty on the original deed or instrument; which particular stamp must be impressed on the duplicate or counter-part, on the same being produced for that purpose to the Commissioners of Inland Revenue, together with the original deed or instrument, "and on the whole being duly executed and duly stamped in all other respects" (*p*). "The counterpart of any lease of lands, tenements, or hereditaments, being duly stamped with the said stamp-duty of five shillings, or any higher stamp-duty (exclusive of progressive duty) and not being executed or signed by, or on the behalf of any lessor or granter, shall be available as a counterpart, without being stamped with a particular stamp for denoting or testifying the payment of the stamp-duty chargeable on the original lease" (*r*).

(*m*) 37 Geo. III, 136, §§ 5, 6. (*n*) 55 Geo. III, c. 184, § 10—Bowack, 1804, M., "Bill of Exchange," Appx., No. 15. (*o*) Robertson *v.* Ettles, 1834, 7 W. S., 176. (*p*) 13 and 14 Vict., c. 97, Sch. *voce* Duplicate. (*r*) 16 and 17 Vict., c. 59, § 12.

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such, and that it could not be stamped with a penny receipt-stamp; M'Cubbin *v.* Stephens, 1856, 18 D., 1224. But mere acknowledgments of debt do not require a stamp; Hamilton's Executors *v.* Struthers, 1858, 21 D., 51. And where a document acknowledged debt and contained a promise to pay, but not on a day certain, or at sight, or on demand, Lord Ardmillan held that it did not require to be stamped; Brand *v.* Linton, 1858, 20 D., 728. It was held that a document to the following effect, written and signed by a bank agent, was a letter of credit, and required a stamp:—"*Edin. and Glasgow Bank, Cupar Angus, 15th Sept.* 1856.—"Be so good as pay the orders of Mr Macgregor on me, which will be paid on presentation here. The sum to be confined to £1000, and to be paid within one fortnight from this date." The document was not addressed to any one, and the Lord Justice-Clerk (Hope), for that reason, dissented, and thought the document did not fall within the stamp acts; Waterston *v.* The Edinburgh and Glasgow Bank, 1858, 20 D., 642.

§ 993. Important provisions were introduced in a recent stamp act, which enable any one, on paying a fee of ten shillings to the Commissioners of Inland Revenue, to obtain their opinion what stamp a deed requires; and upon payment of the stamp-duty which the Commissioners may determine, or, if the deed bears an insufficient stamp, on payment of the difference between that stamp and the stamp which the deed ought to bear, and on payment of the penalty, if any, payable on stamping, or if the full stamp-duty has been previously paid or denoted upon the deed, then the Commissioners shall impress upon the deed a particular stamp, which shall be deemed to signify and denote that the full stamp-duty chargeable on the deed has been paid; and every deed or instrument so impressed shall be deemed to be duly stamped, and shall be receivable in evidence in all courts of law or equity, notwithstanding any objection made to it as being insufficiently stamped. But such stamp may not be impressed upon any deed or instrument chargeable with *ad valorem* duty under the head of bond or mortgage in the schedule to the act, where the same is made as a security for the payment, or transfer, or re-transfer of money or stock, without any limit as to the amount thereof. And the act does not authorise the Commissioners to stamp with the particular stamp referred to any probate of a will or letters of administration, or to stamp therewith any deed or instrument after subscription in any case in which the stamping thereof is expressly prohibited (*s*).

§ 994. If a deed or instrument presented to the Commissioners of Inland Revenue under this power, is in their opinion not chargeable with any stamp-duty, they are required to impress upon it a particular stamp, signifying that it is not chargeable, and the deed or instrument so impressed may be received as evidence, notwithstanding any objection that it is subject to stamp-duty (*t*).

§ 995. If the party who presents the deed to the Commissioners is dissatisfied with their determination in either of the cases mentioned in the two preceding sections, he may appeal to the Court of Exchequer at Westminster, whose decision on the point is final (*u*).

(*s*) 13 and 14 Vict., c. 97, § 14. (*t*) 16 and 17 Vict., c. 59, § 13.

(*u*) 13 and 14 Vict., c. 97, § 15—16 and 17 Vict., c. 59, § 13. The latter act provides that the appeal be taken to "Her Majesty's Court of Exchequer on the terms and in the manner provided" by the act of 13 and 14 Vict., c. 97; in which the appeal is limited to the Court of Exchequer at Westminster.[8]

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[8] By 19 and 20 Vict., c. 56, the Court of Session is constituted the Court of Exchequer in Scotland.

§ 996. As to the number of stamps required for a deed, the rule is, that if the subject-matter of the deed is truly single, only one stamp is necessary, although there may be many persons interested in diverse ways under it (*x*). This is the case in composition-contracts with creditors, and trust-conveyances by creditors in order to do common diligence with a view to saving expense (*y*). So a bond granted by three persons, obliging themselves jointly and severally to pay the debts due to certain creditors (who were six in number) of a debtor against whom diligence had been executed, was sustained, although it only bore one stamp corresponding to the aggregate sum in the bond (*z*). Thus, also, in an English case, a single stamp was held to be sufficient for a bond by six persons, obliging themselves severally in a penalty on contravention by all and each of them of certain conditions (*a*). And a bond containing a personal obligation by a husband, with a disposition by his wife of certain heritable property in security of it, was held to require only a stamp applicable to an heritable bond (*b*).

§ 997. But where a deed embraces separate transactions, to each of which a stamp is applicable, it must bear a corresponding number or amount of stamps, whether the parties interested in the transaction be the same or different (*c*). This has been held as to an instrument of protest which included several bills between the same parties (*d*), an instrument of sasine embracing infeftment on three several charters (*e*), and a deed of admission (in England) of five burgesses (*f*). The question was once raised, whether a conveyance to one person in liferent and to another in fee, bearing an *ad valorem* stamp applicable only to the right of the fiar, was adequately stamped (*g*). And in a case where Yeaman conveyed heritable property to Wilkie, under burden of an annuity to Yeaman during his life, and after his death to his widow, and the deed bore the stamp required for a conveyance, but not also that appropriate to a grant of annuity, the Lord Ordinary (Cuninghame) held that

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(*x*) 1 Bell's Com., 322—Tait on Ev., 152—Chitty on Stamps, 142—1 Phil. Ev., 508.
(*y*) Bell's Com., *supra*. (*z*) Johnston and Co. *v.* Athwell, 1801, M., "Writ," App., No. 5. (*a*) Bowan *v.* Ashley, 1805, 1 Bos. and Pull., New R., 274—See also Davis *v.* Williams, 1811, 13 East, 282. (*b*) Brown *v.* Bedwell, 1830, 9 S., 136. (*c*) 1 Bell's Com., 322—Tait Ev., 152—1 Phil. (7th ed.), 508—Chitty on St., 142, 182. (*d*) Barbour *v.* Newall, 1823, 2 S., 328—Corrie *v.* Barbour, 1827, 6 S., 268—Napier *v.* Carson, 1828, ib., 500. (*e*) Mackintosh *v.* Grant, 1831, 9 S., 583. (*f*) King *v.* Reeks, 1727, 2 Ld. Raym., 1445.
(*g*) Denniston *v.* Campbell, 1824, 3 S., 218.

the stamp was inadequate; but the Inner House waived the point, and decided the case on other grounds (*h*).[9]

§ 998. But a stamp is not rendered useless by a deed having been written upon it which has not been executed; and, therefore, where a transfer of shares of stock was on paper bearing the proper stamp, but on which an unexecuted lease had been previously written, and the testing clause of the transfer bore that all words "other than those contained in this present assignation, are, and shall be, held *pro non scriptis* and erased," the Court held that the transfer was duly stamped (*i*). Nay more, a deed written and executed on a proper stamp is not rendered ineffectual by a second deed relating to a different subject having been subsequently written on the same paper (*k*). And when the same deed embraces different matters, and the stamp applies only to one of them, it will be effectual in so far as that branch of it is concerned (*l*). It is matter of evidence to which of the transactions the stamp applies (*m*). In general it will be held applicable to the matter which is first set forth in the deed (*n*). But if there is ground for attributing it to any of the other transactions, it will be so treated; as, for example, where it had been affixed after the deed had been executed, and the stamp-office receipt on it bore that the penalty had been paid by a party who was concerned in only one of the transactions (*o*).[10]

(*h*) Wilkie *v.* Flowerdew, 1850, 12 D., 818. (*i*) Longmore *v.* Lindsay, 1845, 7 D., 1098. (*k*) Ross *v.* Steven, 1749, M., 16,935.

(*l*) 1 Bell's Com., 322, note 3—Robertson *v.* Ogilvie, 1834, 12 S., 580—Copley *v.* Day, 1811, 13 East, 241—Perry *v.* Bouchier, 1814, 4 Camp., 80.

(*m*) Cases in preceding note. (*n*) Robertson *v.* Ogilvie, *supra*—Perry *v.* Bouchier, *supra*—Bell's Com., *supra*. (*o*) Copley *v.* Day, *supra*.

[9] Where several letters are produced to prove an agreement, it is sufficient if any of them is stamped with a shilling stamp, whatever be the number of the words in the letters; 23 and 24 Vict., c. 15, schedule *voce* Agreement. Where, on the appointment of a new trustee, the property being the subject of one trust-settlement, or the subject of several trusts created for the benefit of the same parties, more than one deed is necessary or desirable to vest the trust property in the new trustee, it is sufficient if one of the deeds is stamped with the duty of £1, 15s., and the others may be stamped as duplicates; 24 and 25 Vict., c. 91, § 80.

[10] But if a deed be granted for two purposes—the one primary, and the other subordinate,—the deed must be stamped as a deed for the primary purpose, and, if it is not, it cannot be looked at when produced for the subordinate purpose. But it will be held well stamped if stamped as a deed for its primary purpose. Thus where a discharge of the sum in a bond, written on the back of the bond, contained besides, a warranty of the discharge, a declaration that a certain bond and assignation and a policy of assurance had been delivered to the granter of the bond, and a clause of registration; and bore a receipt-stamp only, the discharge was sustained as sufficiently stamped; because

§ 999. Where the second half of one of the sheets of stamped paper on which a lease had been written had been removed, and had been replaced by an unstamped half-sheet introduced immediately after the half-sheet which remained, and on which the stamp had been impressed, the deed was held not to be properly stamped, although the stamp would have been sufficient in amount if the unstamped leaf had not been interpolated (*p*).

§ 1000. As a stamp is exhausted by a deed having been written and executed on it, a new stamp is requisite if any material alteration is afterwards made on the deed (*r*). But the first stamp is not voided by alterations which have been made for the purpose of more fully explaining the original contract (*s*), or of correcting errors, and thereby making the deed consistent with the original intention of the parties (*t*). Alterations *in substantialibus* on bills and promissory-notes may be made by consent of the parties, if the document has not been issued; but alterations made thereafter are fatal (*u*).[11]

§ 1001. Upon the principle of international law, that a deed valid by the *lex loci contractus* is binding in another country, deeds properly stamped by the law of the country where they are made, and deeds which do not require a stamp by that law, are effectual in this country, although not bearing the stamp required for such deeds by our own statutes (*x*). But, of course, this principle does not protect deeds executed in Britain, and falsely bearing to have been made in a country where a stamp is not required; and a fraud of this nature may therefore be proved *prout de jure* (*y*).

(*p*) Nicol *v.* Fraser, 1841, 3 D., 890. (*r*) 1 Bell's Com., 321, 322—Tait Ev., 153—1 Phill. Ev. (7th ed.), 511—Tilsley on Stamps, 358, 360.

(*s*) *Supra*, § 889, *et seq.*—Waters *v.* Houghton, 1827, 1 Man. and Ry., 208—Tilsley 362. (*t*) *Supra*, § 889, *et seq.*—Bell's Com., *supra*—1 Phill. Ev. (7th ed.), 517—Tilsley, *supra*. (*u*) *Supra*, § 889, *et seq.* (*x*) 1 Bell's Com., 320—Chitty on Stamps, 277—1 Phill. Ev. (7th ed.), 505—Story's Confl., § 318—Crutchy *v.* Mann, 1814, 5 Taunt., 529—Snaith *v.* Mignay, 1813, 1 Man. and Sel., 87.

(*y*) 1 Bell's Com., 321—Robertson and Co. *v.* Routledge, 1822, 1 S., 562—Ogilvie *v.* Taylor, 1849, 12 D., 266—Jordain *v.* Lashbrook, 1797, 7 Durf. and E., 601—Abraham *v.* Dubois, 1815, 4 Camp., 269.

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substantially it was a receipt, and the other clauses in it were collateral and subordinate; Fleming *v.* Robertson, 1859, 21 D., 982—Tilsley on Stamps, 591.

[11] Alterations on bills, even after they are issued, may be made with consent of the parties to the bill, to correct a mistake and make the bill consistent with the original intentions of the parties. But such alterations, whether made after or before the bill has been issued, will, if *in substantialibus*, be fatal to the bill, if made by one party with-

§ 1002. A recent stamp act has imposed duties (which are denoted by adhesive stamps) on bills of exchange drawn abroad and negotiated within the United Kingdom, wheresoever they may be payable. The statute ordains that "the holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this act charged on such bill; and the person who shall indorse, transfer, or negotiate, such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed," in the mode already mentioned (z). It is also enacted that "every bill of exchange which shall purport to be drawn at any place out of the United Kingdom, shall, for all the purposes of this act, be deemed to be a foreign bill of exchange, drawn out of the United Kingdom, and shall be chargeable with stamp-duty accordingly, notwithstanding that in fact the same may have been drawn within the United Kingdom" (a).[12]

§ 1003. The law is not settled as to the admissibility of a deed which is ineffectual in the *locus contractus* from want of the stamp required by the law there prevailing. In such questions there is a conflict between the principle that the *lex loci contractus* regulates the validity of a deed when sued upon in a foreign country, and the principle that the courts of one state are not bound to enforce the revenue laws of another, thereby perhaps increasing the resources of a hostile power. The law on the point seems to be, that the latter principle prevails in regard to deeds made in independent states (b); but that those granted in any of the British colonies must bear the stamps required by the colonial law (c). This dis-

(z) 17 and 18 Vict., c. 83, § 5; *supra*, § 989. (a) 17 and 18 Vict., c. 83, § 4.

(b) James v. Catherwood, 1823, 3 Dow. and Ry., 190. Here unstamped French receipts were received, and Abbot, C. J., observed, "The point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British Court we cannot take notice of the revenue laws of a foreign state. . . . . Foreign states do not take any notice of our stamp laws, and why should we be more courteous to them?" See also Wynne v. Jackson, 2 Russ. R., 351, —per L. Mackenzie in Taylor v. Scott, 1847, 9 D., 1504, 8—Holman v. Johnson, 1775, 1 Cowp., 343—Planché v. Fletcher, 1779, 1 Doug., 251—Bouchier v. Lawson, 1734, Lee's Ca. Temp. Hardw., 194. (c) See Alves v. Hogson, 1797, 7 Durf. and E., 241—Crutchley v. Mann, 1814, 5 Taunt., 529—Glegg v. Levy, 1812, 3 Camp., 166.

out the consent of the other; Edinburgh and Glasgow Bank v. Samson, 1858, 20 D., 1246. See *supra*, § 892, note 7.

[12] See 23 Vict., c. 15, and 23 and 24 Vict., c. 111. *Supra*, note 3.

tinction—which is not established expressly by decision—reconciles principles otherwise conflicting. It is also consistent with sound policy, on account of the mutual interest and oneness of all Her Majesty's dominions, and because the reciprocal enforcement of our own stamp laws may be secured in the colonies, which it cannot be in countries under a foreign government (*d*).

§ 1004. At all events, where a deed or instrument executed on unstamped paper, in a country which is independent of the British Crown, may, by the law of that country, be validated by being stamped *ex intervallo* on payment of the duty or a penalty, it seems to be plain that the Courts of this country ought not to refuse action on the deed until it has been transmitted to the foreign country and there stamped. Such a deed was validly executed at its date, although it required to be stamped before it could sustain action in the courts of the *locus contractus ;* and to refuse action upon it in this country would be equivalent to ordering payment to be made to the exchequer of a foreign state, as the condition upon which action could be enforced upon the deed in Britain (*e*). The difficulty noticed in the preceding section only exists where it is a nullity by the *lex loci contractus*, that the deed in issue was not written on paper duly stamped before execution.

§ 1005. In general, the production of the deed will show whether or not it is properly stamped. And where there were traces of a stamp of some kind, and the deed bore to be duly stamped, it was held in England that the deed was admissible, unless the challenger proved that the stamp was inadequate (*f*). Where the original deed cannot be produced, the party leading secondary evidence of its contents, or proving the tenor of it, is not obliged to prove that it was stamped; because he is entitled to the presump-

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(*d*) This distinction is recognised in Chitty on Bills, 121—Chitty on Stamp Laws, 276—Tilsley on Stamp Laws, 282. The application of the *lex loci contractus* in all cases is favoured by 1 Phill. (7th ed.), 505—III. Burge. Com., 762—Story, Conf. of Laws, §§ 260, 318, 631—1 Bell's Com., 321—Tait. Ev., 156. (*e*) It is also easy to figure cases where adopting the opposite rule from that stated in the text would occasion injustice and confusion; as where the stamp-office of the foreign state refused or delayed to affix the proper stamp, or where it demanded an exorbitant penalty for doing so to a deed founded on by a British subject, while it dealt leniently with unstamped deeds (perhaps forming parts of the same series of transactions) in which a foreigner was grantee. (*f*) Doe d. Fryer *v.* Coombs, 1842, 3 Ad. and Ell., New R., 687.

tion *omne rite et solenniter actum* (*g*).[13] But slight evidence of want of stamping will reverse the burden of proof; as where a witness producing the counterpart of a deed, which was withheld by the party against whom he was adduced, deponed that the other part was unstamped (*h*).

§ 1006. An unstamped deed is admissible in order to prove facts collateral to its purpose, as a deed requiring to be stamped. The reason is, that the fisk is only concerned with excluding the document as evidence of the matter to which the stamp is applicable, and that while courts of law are bound to protect the revenue, "it is not their duty to strain the construction of the stamp acts, so as, without regarding the object of the Legislature, to deprive parties of the means of evidence" (*i*).

The leading decision on this subject occurred recently in an action for payment of an alleged balance of money due for work executed by the pursuer, where the defender tendered an account to which a signed, but unstamped, writing was annexed in these terms,—"I acknowledge to have received from K. Matheson sixty-eight pounds nine shillings and four pence, being balance amount of pay-bills payed from 7th August to 10th December both inclusive." The sum corresponded with the balance in the account, and the defender tendered the writing, not as proof of payment of that sum (which was admitted) but as an admission by the pursuer of the accuracy of the account and relative balance as at a certain date. The Court of Session, by a majority of the whole judges, rejected the document, holding that it required to be written on a receipt-stamp; but the House of Lords reversed the decision, on the ground that the document was not tendered in order to prove the receipt of money, but a matter entirely independent of its contents, as evidence of that fact (*k*). In reviewing the decisions in this class of cases, Lord Chancellor Cottenham observed,—"Upon a consideration of the cases both in this country and in Scotland, but particularly in this country, I find that they are so very inconsistent with one another, and they seem in most instances to be so

(*g*) 1 Bell's Com., 322, note 6—More's Notes, 387—Tait, 154—Shand Prac., 838—Crisp *v.* Anderson, 1815, 1 Stark R., 35. (*h*) Crowther *v.* Solomons, 1848, 18 Law Journ., N. S. (Com. Pl.), 92—See also Rippinier *v.* Wright, 1819, 2 Barn. and Ald., 478—R. *v.* Inhab. of Castle Morton, 1820, 3 ib., 588. (*i*) Per Lord Brougham in Matheson *v.* Ross, *infra*. (*k*) Matheson *v.* Ross, 1849, 6 Bell's Ap. Ca., 374; reversing, 9 D., 1366.

[13] Closmadeuc *v.* Carrel, 1856, 18 Scott's C. B., 36—Best on Evidence (3d ed.). 310.

little regulated by any fixed rule or principle, that it would be a hopeless task to endeavour to reconcile them." At the same time, his Lordship added, that it appeared to him "that, from all the cases, a certain principle may be extracted, which seems to have regulated the minds of the judges who decided those cases; although questions may be raised undoubtedly upon many of them as to the mode in which that principle is to be applied." The learned Lord then proceeded to show that the question, whether an unstamped deed is tendered for a collateral purpose, does not depend on whether the obligation, discharge, or other matter to which the stamp applies, is directly, or is only incidentally, involved in the issue, but upon whether the document is tendered in order to prove that there has been such an obligation or discharge, whatever bearing, direct or collateral, that fact may have upon the cause. Lord Brougham, also, observing that it was "absolutely hopeless" to attempt to reconcile the cases, expressed a similar opinion on what is a collateral purpose; an expression which his Lordship thought was not perfectly accurate, or always very intelligible. With reference to the question immediately before the House, his Lordship observed—"If the document is used in a way to mix up with it the receiving or paying of money, so that, upon the whole, a receipt of money is the matter for which, or in respect of which, or connected with which, the document is used, it requires, past all doubt, to have a stamp, because it is in one way or another used as a receipt. But if the same document is used for a totally different purpose, it is to me perfectly clear that it is not to be regarded as a receipt." Lord Campbell's view was more strict as to the admissibility of the document. Concurring with the other noble and learned Lords on a distinction pointed out by the term "collateral purpose," his Lordship considered that the admissibility of the document did not depend on whether the party ostensibly tendered it to prove a collateral fact, but on whether the issue involved only such a fact, and not any matter which could be affected by proof of the transaction or obligation for which the stamp was required. His Lordship observed,—"My opinion is, that if a document purporting to be a receipt, but unstamped, is offered in evidence for any purpose during a trial, if it would be evidence when stamped as a receipt to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely by the parties saying 'I offer it for a collateral purpose, and let the receipt part be taken *pro non scripto.*' I think you cannot abstract a part of the document in this manner, and give the rest

in evidence. The criterion, therefore, seems to me to be, not whether the party seeks to make use of it as a receipt, but whether it can be made use of as a document to settle any question litigated between the parties; and had this sum of £68 : 9 : 4 been in dispute, I should have thought that this document would not have been receivable in evidence for any collateral purpose. For only see the danger that would arise. Can the jury be told, 'You are to discharge from your minds everything that applies to the receipt that is not upon stamped paper, and therefore it is not in evidence:—but you are to look to the other part of it, and that you are to apply to another and a collateral purpose.' I think this would be a dangerous doctrine; I find no case that has gone so far."

§ 1007. Without attempting to reconcile the decided cases,—which would be a futile task,—the following may be noted as farther bearing upon the doctrine evolved by the case of Matheson *v.* Ross. A parish clergymen addressed a letter to the presbytery of the bounds, stating that owing to age and infirmity he had become unable to discharge his duties, that he therefore requested the presbytery to take steps for the appointment of an assistant and successor to him, and that he would give bond for the annual sum of £50 to the person so to be appointed. The patron thereafter presented an assistant and successor; and the minister opposed the appointment, on the ground that he had not consented to the person so nominated. The presentee and presbytery having founded on the letter, it was admitted to prove the consent, notwithstanding the objection that it contained an obligation to pay money and was unstamped (*l*).

§ 1008. In another case, a party seeking to reduce on the ground of facility and circumvention a deed of settlement, dated 11th September, founded (among other evidence) upon a deed dated 20th November, by which the deceased revoked all deeds of settlement executed by him within the previous three months. The defender tendered a writing, executed by the deceased on 21st November, and duly tested, which set forth that a certain person had repeatedly called upon the deceased to induce him to alter the deed of 11th September, and that the day preceding (that is, on 20th November) the deceased, contrary to his wishes, had been induced by that person to execute a deed or deeds revoking all his previous deeds of settlement. The document concluded by a clause ratifying and confirming the deed of 11th September, and revoking all other

(*l*) Paton *v.* E. Zetland, 1843, 5 D., 1049.

settlements or writings inconsistent with it. The pursuer objected that this document, being a deed of revocation, was inadmissible, as it did not bear a deed stamp. The presiding judge (Lord President Boyle) repelled the objection; and his Lordship's ruling was sustained on a bill of exceptions. Lords Gillies and Mackenzie considered that as the only issue before the jury was facility and circumvention, the document was admissible in order to rebut that issue, by showing the state of mind in which the deceased had been, and his feelings towards the pursuer at a certain date; while its application to that purpose did not depend on its validity as a deed of revocation. Lord Fullerton considered that the document was admissible, because in its own intrinsic character it did not require a stamp. But if a stamp had been necessary to give it validity as a deed, his Lordship was of opinion that it would have been inadmissible for the purpose for which it was used. This decision seems not to be consistent with the view expressed by Lord Campbell in Matheson *v.* Ross (*m*); because the document, if properly stamped and admitted to prove the revocation and corroboration respectively which it set forth, might have had an important bearing upon the issue.

§ 1009. Again, in a trial of an issue, whether the defender had "wrongfully, maliciously, and without probable cause," used certain arrestments on the dependence of an action in which he was ultimately unsuccessful, an unstamped deed of agreement between him and a third person was admitted as evidence of probable cause (*n*). The presiding judge (Lord Just.-Cl. Hope) observed, "We are not now in a question of proof as to the property of the sheep (the matter to which the deed related). The question is, whether the defender had probable cause for claiming them upon the assumption of their being his. In that view I think the document is not to be refused." On the same principle, if diligence had proceeded on a bill or other document bearing an inadequate stamp, the document would be admissible for the creditor in an action of damages for wrongous use of diligence. There seems to be little doubt of the justice of such a principle; although, perhaps, it is hardly within the rule laid down in the House of Lords in the case of Matheson *v.* Ross, above cited (*o*).[14]

(*m*) *Supra*, § 1006. (*n*) Henning *v.* Hewatson, 1852, 14 D., 1084. His Lordship's ruling was excepted to. See also Nimmo *v.* Stewart, 1832, 10 S., 844.

(*o*) In the following cases, also, the Court admitted unstamped writings when ten-

[14] In a question as to the onerosity of the indorsation on a bill; an account ren-

§ 1010. It will not be good objection to a document tendered as proof of a person's handwriting, and admitted to be genuine, that it is unstamped; as the obligation, or other matter to which the stamp applies, is quite foreign to the purpose for which the document is used (*p*).

§ 1011. An unstamped receipt is not admissible to prove that a certain *correus* paid a debt, the payment of which by some one of the joint obligants is admitted by the creditor (*r*).

§ 1012. It has been held in England that where a stamped deed has been altered by a document which does not bear the proper stamp to make it effectual as a deed, the latter may be looked at in order to show that there has been an alteration; because, if it were not, a deed would be enforced which the parties intended should no longer be binding (*s*). This, however, is thought not to be a sufficient ratio, where the party founding on the document may get it stamped on payment of a penalty, and the doctrine may be questioned in other cases also.

§ 1013. A recent statute enacts, that "every instrument liable to stamp-duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon, or affixed thereto" (*t*). This rule therefore, ap-

dered for what were considered as collateral purposes; Balfour *v.* Lyle, 1832, 10 S., 853—Gray *v.* Johnstone, 1838, Macf. R., 54—Henderson *v.* Steele, 1829, 7 S., 303—Bennie *v.* Mack, 1832, 10 S., 255—Erskine *v.* Erskine, 1819, 2 Mur., 184. None of these decisions seem to be reconcileable with the views expressed by the House of Lords in the case of Matheson *v.* Ross, *supra*, § 1006. (*p*) *Per curiam* in Mackenzie *v.* Crawford, 1839, 1 D., 1091. (*r*) Scott *v.* Burd, 1845, 8 D., 25.

(*s*) French *v.* Patten, 1808, 9 East, 351—Reed *v.* Deere, 1827, 7 B. and C., 261. The ratio of these decisions would make an unstamped discharge admissible in all cases, lest the obligation should be enforced after it had been extinguished.

(*t*) 17 and 18 Vict., c. 83, § 27. Before this statute was passed, unstamped documents had been received for the Crown in criminal cases; Mackenzie, 1846, Arkl., 97—Beattie, 1850, J. Shaw's R., 356—2 Al. Crim. Law, 610—Bramwell, 28th July 1819, there noted—Dover *v.* Maestaer, 1803, 5 Esp., 92—See Bell's Notes, 280, 1.

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dered by the drawers of the bill to the acceptor, and containing entries of money paid by the acceptor, was admitted to show the state of the balance at its date between the parties to the bill, though it was unstamped; Bannatyne *v.* Wilson, 1855, 18 D., 230. Jottings on an unstamped promissory-note, which were holograph of the maker, and related to payments of interest on the sum in the note, were received in evidence of a loan by the maker of the note to the payee; Fraser *v.* Bruce, 1857, 20 D., 115. But when a defender insisted that a pursuer should find caution for the expenses of process, on the ground that he had divested himself of his property—a disposition *omnium bonorum* by the pursuer was rejected as evidence of the divestiture, because it was unstamped; M'Queen *v.* Murdoch, 1861, 23 D., 725.

plies, whether the document is tendered for the Crown or for the prisoner.

§ 1014. An unstamped deed may be used by a witness to refresh his memory, where parole of the matters which it sets forth is admissible (*u*); and if he has become blind since it was written or signed, it may be read over to him (*x*).

§ 1015. As the national object of the stamp acts ought not to be defeated by the private agreement of litigants, it is *pars judicis* to enforce them for protection of the revenue. Accordingly, the objection that a document is unstamped may be stated at any stage of the cause, although there is no plea on record to raise it, and although it may involve a proof collateral to the issue (*a*). And if the objection has been raised, it may not be waived upon consent of parties (*b*). But it may not be raised after the parties have been out of Court, and the document has been followed by decree in a competent process without the objection having been taken (*c*).[15]

§ 1016. All deeds and instruments executed on paper not properly stamped (unless falling under some special enactment as to stamping, after execution) may be validated by subsequent stamping under certain penalties, which the Commissioners of Inland Revenue have power to remit in whole or part, if they are satisfied that the omission did not arise from intention to defraud the revenue, and if the deed has been brought to them for stamping within twelve months after execution (*d*). From this privilege are excepted bills of exchange and promissory-notes (*e*); which can

(*u*) Dickson *v.* Taylor, 1816, 1 Mur., 142—Catt *v.* Howard, 1820, 3 Stark R., 3—Rambert *v.* Cohen, 1790, 4 Esp., 213—Jacob *v.* Lindsay, 1801, 1 East, 461—Maughan *v.* Hubbard, 1828, 8 Barn. and Cress., 14—2 Al. Cr. Law, 510—1 Phill. Ev. (7th ed.), 504—Chitty on Stamps, 232, 321. (*x*) Jacob *v.* Lindsay, *supra*—Al. Cr. Law, *supra*. (*a*) This is constantly seen in practice. In a reduction of certain bills, the objection that a new obligant had signed after the bills had been issued, and therefore that the stamp had been marred, was entertained after the record had been closed, and when neither fact nor law appeared on record to raise the point; Home *v.* Purves, 1836, 14 S., 898. Lord Balgray observed in this case,—"I have known the objection taken up for the first time in the House of Lords." (*b*) Cadzow *v.* Wilson, 1830, 5 Mur., 99. (*c*) Napier *v.* Carson, 1828, 6 S., 500—Barbour *v.* Grierson, 1828, ib., 860—See also Halley *v.* Leitch, 1833, 12 S., 58—Graham *v.* Gordon, 1842, 4 D., 903; *infra*, § 1020. (*d*) 13 and 14 Vict., c. 97, § 12—44 Geo. III, c. 98, § 24. By regulations of the Inland Revenue Office, deeds may be stamped within sixty days without a penalty. (*e*) 44 Geo. III, ib.—13 and 14 Vict., *supra*.

[15] In England the objection must be taken when the document is tendered in evidence; Robinson *v.* Vernon, 1860, Scott's C. B. N. S., 235.

only be stamped afterwards, if they were originally written on paper bearing a stamp of adequate amount but wrong denomination (*f*). Receipts may be stamped within, but not beyond, a month after they "shall be given or bear date" (*g*). Charter-parties may be stamped within a month from the first date they bear, and on payment of a penalty (*h*). Bills of lading cannot be stamped after subscription (*i*). A stamp cannot be affixed to executed policies of marine insurance (*k*), except in cases of additional stamps for policies of mutual insurance which were not underwritten for a sum beyond what the original stamp would warrant (*l*). Proxies for voting at meetings of shareholders of joint-stock companies may not be stamped after subscription (*m*).

§ 1017. Such agreements as are subject only to a stamp of two shillings and sixpence may be stamped within fourteen days of execution, without payment of any penalty (*n*). A similar privilege extends to attested copies of deeds, if stamped within sixty days from the date of attestation (*o*). Deeds executed abroad, also, may be stamped without any penalty, if presented to the Commissioners of Inland Revenue within two months after they have been received in the United Kingdom (*p*).

§ 1018. Formerly, when a deed was stamped after execution, a receipt for the penalty was written upon it. But now, in lieu of this receipt, a stamp denoting the penalty is impressed on the deed in addition to the usual stamp applicable to it; and no deed or instrument which has been stamped after execution can be pleaded or given in evidence, unless it shall have been stamped with the particular stamp referred to (*r*).

§ 1019. A deed stamped after execution, where that is competent, is equally valid as if it had been written upon paper or vellum previously stamped (*s*).

§ 1020. Where subsequent stamping is competent, and the statutory period for it (if any such is prescribed) has not expired, it may take place at any stage of the cause in which the document is produced, and although the parties have joined issue on the deed

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(*f*) 37 Geo. III, c. 136, §§ 5, 6. Even in such cases there is a penalty.

(*g*) 35 Geo. III, c. 55, §§ 10, 11. This also is under a penalty.

(*h*) 5 and 6 Vict., c. 79, § 21. (*i*) Ib. (*k*) 35 Geo. III, c. 63, § 14.

(*l*) 9 Geo. IV, c. 49, § 1. (*m*) 7 and 8 Vict., c. 21, §§ 6, 7.

(*n*) 7 and 8 Vict., c. 21, § 5. Such agreements may be stamped after the fourteen days on payment of a penalty; ib. Agreements subject to a higher duty fall under the general provision of 13 and 14 Vict., c. 97, § 12, and relative regulations, *supra* (*d*).

(*o*) 39 and 40 Geo. III, c. 84, § 2. (*p*) 13 and 14 Vict., c. 97, § 13.

(*r*) Ib., § 12. (*s*) 37 Geo. III, c. 136, § 2—13 and 14 Vict., c. 97, § 12.

when unstamped (*t*). The Court are also in the constant practice of sisting process, in order to allow this objection to be removed before they pronounce judgment (*u*). Even after a jury trial, where one party has lost in consequence of a document tendered by him being excluded as unstamped, the Court allow a new trial on its being produced to them with the defect removed (*x*). And where the parties to a trial had agreed that copies should be received as originals, and a copy of an unstamped deed was admitted without objection, it was held that the want of stamping could not be pleaded in a bill of exceptions on other grounds, the proper stamp having been impressed on the deed in the meantime (*y*).

§ 1021. Subsequent stamping validates diligence on the unstamped deed by adjudication or inhibition (*z*), by action of mails and duties (*a*), or poinding the ground (*b*), and even by caption and imprisonment (*c*). But in a suspension of a charge, on the ground that the deed on which it proceeded was not duly stamped, the Court refused to delay disposing of the case until a proper stamp should have been affixed; and they accordingly granted the suspension on caution (*d*). Where the claim of a creditor in a sequestration has been rejected, because the deed on which it proceeded was unstamped, it will be sustained on the deed being stamped in the interval between the finding of the trustee and the decision of the Court on a reclaimer (*e*). And the same rule applies to the case of a creditor, whose vote for the trustee has been rejected on the ground that his document of debt was not stamped (*f*). Nay more, where the debt of the petitioning creditor in a sequestration was founded on an unstamped deed, the sequestration was sustained against a petition for recal at the instance of the bankrupt, the deed

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(*t*) Cases in following notes. It has been questioned whether a deed may be stamped after the case has been heard in the House of Lords; Miller *v.* Moodie, 1833, 7 W. S., 12. (*u*) See, for example, Boyd *v.* M'Kenna, 1824, 2 S., 712—M'Niven *v.* Hunter, 1836, 14 S., 685—Union Insurance Co. *v.* Bontine, 1838, 16 S., 1241—Church *v.* Sharpe, 1843, 5 D., 876—Harvey *v.* Miller, 1845, 7 D., 898. But see Mackintosh *v.* Grant, 1831, 9 S., 583, *infra*, (*h*). (*x*) Wallace *v.* Gray, 1836, 14 S., 541—Ivison *v.* Edin. Silk Co., 1845, 8 D., 236. (*y*) Graham *v.* Gordon, 1842, 4 D., 903.

(*z*) Kingstone's Crs., 1743, Elch., "Writ," No. 14—Lamont *v.* Lamont's Crs., 1789, M., 5494; 16,945—Wright *v.* Murray, 29th June 1821, as noticed by Lord Ordinary in Davidson *v.* Gibb, *infra*—See also Smith *v.* Flowerdew, 1850, 12 D., 818.

(*a*) Davidson *v.* Gibb, 1838, 1 D., 10. (*b*) Wood *v.* Ker, 1838, 1 D., 14.

(*c*) King *v.* Baillie, 1844, 7 D., 228. (*d*) Lillie *v.* Finlater, 1835, 14 S., 127—See also Mackintosh *v.* Grant, *infra*, (*h*). (*e*) Law *v.* M'Laren, 1849, 11 D., 1489. (*f*) Morries *v.* Glen, 1843, 6 D., 97—Ironside *v.* M'Gowan, 1847, 19 Sc. Jur., 597.

having in the meantime been stamped (*g*). In like manner, an action of removing, which was raised on an unstamped lease, may be proceeded with on the defect being cured (*h*).

§ 1022. The want of a proper stamp is only fatal to the document, and does not affect the obligation, discharge, or other transaction therein set forth, except in so far as that may depend on the deed. Accordingly, if an obligation, to the constitution of which writing is not essential *ex solennitate*, is admitted on record, the objection that the document constituting it is unstamped will be unavailing; the record being full proof without reference to the document (*i*). And where a bill or other document has been cut down on account of not being duly stamped, the creditor may prove the debt by the debtor's writ or oath on reference, or by such other evidence as the case admits of (*k*). But where a document, if stamped, would have required to be produced, and parole of its terms would have been inadmissible, under the rule which requires the best evidence, parole will not be rendered competent to prove the obligation, in consequence of the deed being excluded as unstamped (*l*). Accordingly, where documents which were held to constitute a lease for a year were unstamped, and therefore inadmissible, the Court refused to admit parole of the terms of the contract (*m*).[16]

(*g*) Robb *v.* Forrest, 1831, 8 S., 1035; affd., 5 W. S., 740.

(*h*) M'Naught *v.* Graham, 1834, 12 S., 619—Ross *v.* Webster, 1834, 12 S., 308. The same rule was applied in election cases, where a party claimed on a deed not properly stamped, and got the defect cured before his claim had been finally disposed of; A B, 16th February 1819 (not rep.), noted 1 Bell's Com., 739—Dennistoune *v.* Campbell, 1824, 3 S., 218. But where a claim had been rejected by the Freeholders' Court on other grounds, and on the case coming to the Court of Session the objection was, for the first time, taken that the deed claimed upon was not duly stamped, the Court held that the claim had been properly rejected, and refused to supersede the case until the defect should be cured; Mackintosh *v.* Grant, 1831, 9 S., 583.

(*i*) 1 Bell's Com., 322—per L. Ch. Eldon in Huddleston *v.* Briscoe, 1805, 11 Vesey, 596—Thynne *v.* Protheroe, 1814, 2 Ma. and Sel., 554—See also Matheson *v.* Ross, 1847, 9 D., 1366; reversed on merits, 6 Bell's Ap. Ca., 374, noted *supra*, § 1006. But merely admitting that the deed in question was signed, without admitting the obligation, is not sufficient; Greenock Bank *v.* Darroch, 1834, 13 S., 190. And admissions of the obligation will not obviate the want of stamping, unless they were made on record; Ogilvie *v.* Taylor, 1849, 12 D., 266. (*k*) Bell's Com., *supra*—Gall *v.* Fordyce, 1828, 6 S., 943—Greenock Bank *v.* Darroch, *supra*—Chitty on Stamps, 323—Brown *v.* Watts, 1808, 1 Taunt., 353—Farr *v.* Price, 1800, 1 East, 58. (*l*) See *supra*, § 114—Cases in next note. (*m*) Hutchison *v.* Ferrier, 1851, 13 D., 837 (affd. on another ground, 1 Macq., 196)—See also R. *v.* Inhab. of St Paul's, 1795, 6 Durf. and E.,

[16] In an action for the price of goods sold under a written contract, which referred

§ 1023. Where writing is essential to the constitution of a right or obligation, *e.g.*, a sale of heritage not followed by *rei interventus*, the want of such a document duly stamped (where stamping is required) cannot be obviated by other evidence, or even by admissions on record; because, unless the contract has been completed in the mode referred to, there is *locus penitentiae* from it as an unfinished transaction.[17]

CHAPTER XII.—RULES OF INTERNATIONAL LAW REGARDING DEEDS.

§ 1024. Difficult questions sometimes arise as to the effect of deeds, formal by the law of the country where they were executed, but not bearing the solemnities required by the law of a different country in which action is raised upon them. For a full examination of these questions reference must be made to the treatises on international law (*a*). The scope of this work only admits of a summary of the doctrines on the subject, especially as these have been evolved by Scotch decisions.

§ 1025. There are two general rules in this class of cases, namely—First, that obligations regarding moveables are regulated by

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452—Turner *v.* Power, 1828, 7 B. and C., 625; Mo. and Mal., 131, S. C.—Hodges *v.* Drakeford, 1805, 1 Bos. and Pul. New R., 270—Ramsbottom *v.* Mortley, 1814, 2 Ma. and Sel., 445—Buxton *v.* Cornish, 1844, 1 Dow. and L., 585—R. *v.* Inhab. of Castle Morton, 1820, 3 B. and Ald., 588—Chitty on Stamps, 322—and Harrold *v.* Polloxfen, 1844, 6 D., 1103. (*a*) This subject is discussed in 2 Boullenois, 458, *et seq.*—Story's Confl. of Laws, § 360 (*a*), *et seq.*—3 Burge Com., 751, *et seq.*—Ersk., 3, 2, 39, *et seq.*—Kames' Equity (4th ed.), 548, *et seq.*

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for the terms of payment to an arrangement between the defendant and a third party, it was proved that this arrangement was in writing, and that the writing was unstamped. It was held that the plaintiff could not recover, because he could not prove the terms of payment, parole evidence being incompetent because of the existence of the writing; and the writing being inadmissible, because it was unstamped, and because the period had elapsed during which it could be stamped; Alcock *v.* Delay, 1855, 4 Ell. and Blackb., 660.

[17] Deeds relating solely to the estate of a sequestrated bankrupt, and forming part of the proceedings in a sequestration, are exempt from stamp-duty, by 19 and 20 Vict., c. 79, § 184. "No will, testament, testamentary instrument, or disposition *mortis causa*, shall be chargeable with any stamp-duty;" 23 Vict., c. 15, § 7.

the *lex loci contractus* [illegible] the subjects of these obligations [illegible] [illegible] parties [illegible] the law of the country where the [illegible] and this [illegible] in regard to its [illegible] and the [illegible] and they ought not to be allowed to escape from [illegible] on account of [illegible] in another country [illegible] heritable estate are regulated by the *lex rei sitae*, because the [illegible] of that class of [illegible] and because the rules as to transmitting, burdening, or otherwise affecting [illegible] enter into the public law of every state.

[illegible] of these rules however, there are exceptions; the *lex loci contractus* [illegible] sometimes [illegible] in obligations relating to heritage, and the *lex* [illegible] in a few respects the rule in [illegible] as to personal estate.

§ [illegible] Under the view of these principles deeds of personal [illegible] and deeds for transmitting personal property [illegible] executed in a foreign country according to the law there prevailing, are effectual when founded upon in a Scotch court. So, a [illegible] executed in England according to the forms prescribed by English law is valid [illegible] in this country ([illegible]); and bonds granted by English [illegible] in the English form were held to be validly transferred by blank indorsations in England; the act 1696, c. 25, about blank writs, being found not to apply to them ([illegible]). In like manner, a will executed according to the law of the deceased's domicile, is valid in another country, although it may not

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[illegible] Ersk. 3. 2. 40—Kames' Equity, 4th ed., 364—2 Boullenois, 487—Story Confl. § 260—F[illegible] v. Shewan, 1[illegible], M. 4429—Galbraith v. Cunningham, 1626, M. 4430—Harper v. Jaffray, 1630, M. 4431; 17,016, S. C.—Elphinston v. Rollo, 1665, M. 17,018—Salton v. Salton, 1673, M. 4431—La Fine v. Semple's Crs., 1721, M. 4451. In this case a bond granted in England, containing power to register in Scotland, and therefore intended to be effectual here, was sustained although defective in the solemnities required by the act 1681, c. 5, because it was formal by the law of England. See also Ogilvy v. Murray, 1724, Rob. Ap. Ca., 499. [illegible] Ersk. *supra*—Kames' Equity, 356—3 Burge Com., 751—Falconer v. Beattie's Heirs, 1627, M. 4501; 1 B. Sup., 149; 240, S. C.—Sinclair v. Murray, 1636, M. 4501—Erskine v. Ramsay, 1664, M. 4502. In all these cases the cedent, assignee, and common debtor were Scotchmen. In Scott v. Tosh, 1676, M., 4502, effect was given to an assignation made in Holland, and contained in an instrument the warrant of which the notary kept in his hands, according to the custom of that country. [illegible] Gt. Northern Ry. Co. v. Laing, 1848, 10 D., 1408. [illegible] Rankine of York Buildings Co., 1783, M. 4472.

bear the solemnities which the law of that country prescribes for wills executed within its bounds (*f*).[1]

§ 1027. On the other hand, if an obligation or conveyance regarding moveables is deficient in the solemnities required by the *lex loci contractus*, it will not be sustained in another country in which these solemnities are not required (*g*). On this ground effect was refused in Scotland to indorsations made in England by English creditors to English assignees of debts in account due by Scotch debtors; because, although not deficient in any formality required by the law of this country, they were by the law of England invalid both as deeds and under the stamp acts (*h*). In like manner, bills by a person domiciled in Newfoundland, payable to his daughter, with a relative letter to his trustee, not being a competent mode of constituting a testamentary bequest by the law of that country, were held to be ineffectual in Scotland, when sued upon by the daughter (*i*).

§ 1028. Yet the rule last noticed does not render inoperative those deeds which, being intended to take effect in Scotland, bear the solemnities required by Scotch law, but are informal by the *lex loci contractus* (*k*). It is doubtful whether formal deeds of assignation executed in England to personal debts due by parties domiciled in this country are effectual, when framed and authenticated (as they sometimes are) according to the law of Scotland (*l*).

§ 1029. Where the *lex rei sitae* prescribes a particular mode for completing the *jus in re* under contracts and conveyances regarding moveables, it would seem that that procedure must be observed in order to give the grantee the real right to the subject, although it is not required by the *lex loci contractus* (*m*).[2] But the

(*f*) Story Confl., § 465—Wardlaw *v.* Maxwell, 1715, M., 4500—Stewart *v.* M'Donald, 1826, 5 S., 29. Other cases illustrating this rule are cited *infra*, § 1032, *et seq.*

(*g*) Story Confl., § 262—3 Burge Com., 761. (*h*) Tayler *v.* Scott, 1847, 9 D., 1504. (*i*) Sinclair *v.* Alexander, 1851, 14 D., 217. (*k*) Per L. Brougham in Yates *v.* Thomson, 1835, 3 Cl. and Fin., 544; 590—Per L. Fullerton in Tayler *v.* Scott, *supra*—See also Ferguson *v.* Marjoribanks, 1853, 15 D., 637—Story, § 262, note. (*l*) Cases in preceding note. (*m*) 3 Burge Com., 751. Mr Burge refers, by way of illustration, to conveyances of shares in public companies. So an English contract of sale of goods in Scotland, not followed by delivery, although competent to carry the real right to such goods in England, would not have that effect in Scotland in competition with a Scotch sale of later date but completed by delivery. In like manner, Professor Bell lays down that a foreign assignation of a Scotch debt must

[1] See note [10], *infra*.

[2] The view that an arrestment of funds in Scotland will prevail over a foreign as-

grantee under an obligation valid by the *lex loci contractus* has a good ground of action to compel the granter to complete the real right in conformity with the *lex rei sitae* (*n*). In like manner, a foreign executor is not vested with the deceased's moveable estate in this country until he has expede confirmation; but the foreign will or probate, if valid by the *lex domicilii testatoris*, entitles him to confirm (*o*).[3]

§ 1030. Under the *second* general principle above noticed, deeds of transmission of land and its accessories, and of securities over heritage situated in Scotland, in order to be effectual, must be completed in accordance with the law of this country; the observance merely of the solemnities required by the *lex loci contractus* being insufficient to secure their validity (*p*). But an obligation to convey land, if formal by the *lex loci contractus*, may be enforced by action in this country against the granter and his heirs; because it

be completed by intimation (or what is equivalent thereto) in order to carry the debt in competition with arresting creditors; and he mentions that an opinion to the same effect was given by a very learned Scotch lawyer, John Clerk, afterwards Lord Eldin; 2 Bell's Com., 19, and note. Erskine lays down the same rule (3, 2, 42), citing a decision of the Court of Session, but which involved other points, and was reversed on appeal; E. Selkirk *v.* Gray, 1709, M., 4453; reversed, 1 Rob. Ap. Ca., 1 (as to the ground of reversal see Bell's Com., *supra*). The point is still doubtful; see 3 Burge, 777—Story, 395—and note of Lord Rutherfurd (Ordinary) in Wallace *v.* Dacres, 1853, 15 D., 691.

(*n*) 3 Burge Com., 752. (*o*) M. Hastings *v.* M. Hasting's Ex., 1852, 14 D., 489—Stewart *v.* Macdonald, 1826, 5 S., 29—Wardlaw *v.* Maxwell, 1715, M., 4500—Clerk *v.* Brebner, 1759, M., 4471. See *contra*, Shaw *v.* Lewis, 1665, M., 4494, *infra*, § 1046. (*p*) Ersk., 3, 2, 40—Kames' Equity, 549—Tait Ev., 126—Story, § 363—2 Burge, 840, *et seq.*—4 ib., 217, *et seq.*—Cases *infra*, § 1031.

signation not completed by intimation, seems implied in the opinions of the judges in Donaldson *v.* Ord, 1855; although in that case that precise point was not decided, because, in the opinion of English counsel, the English creditor deed, which was there founded on as an assignation, was not of itself sufficient to bar the diligence of creditors; but, to have that effect, required to be brought to the knowledge of those who held the fund assigned; and it was held that no intimation, and nothing equivalent by the law of Scotland to intimation, had been made to them prior to the arrestment. The Court held that the question, whether the claim of the trust-assignees under the creditor deed or that of the arrestees was preferable, would, if competently raised in the action, resolve into a competition of diligence as to the attachment of a fund situated in Scotland, and that that competition must be determined according to the law of Scotland; Donaldson *v.* Ord, 1855, 17 D., 1053. On 4th September 1860, Wittenberg, a Prussian, by bill of sale, executed in Prussia, sold a Prussian ship, then at sea, to Kuhl, also a Prussian. On 5th October 1860, the ship, having arrived at Scotland, was arrested by Wittenberg's creditors. On the opinion of Prussian lawyers, that according to the law of Prussia the bill of sale passed the property of the ship at its date, the Court held the arrestments ineffectual; Schultze *v.* Robinson, 1861, 24 D., 120.

[3] See *infra*, § 1042, note [10].

is a personal obligation *ad factum praestandum* (*r*). Upon the same principle, a disposition of heritage, if valid according to the *lex loci contractus*, should, it is thought, be sustained in Scotland as a ground for ordaining the granter to execute a disposition formal by Scotch law; and this seems to have been held in one case (*s*). But there is an opposite decision (*t*), which Mr Erskine cites as fixing a distinction between a disposition formal by the *lex loci contractus*, and an obligation to convey land having the same formalities (*u*). That learned author, however, was not aware that there was a conflict in the decisions; and there seems to be good ground in principle for holding, with a recent writer (*x*), that as a disposition for an onerous consideration is equivalent to an obligation to convey, it ought to be sustained as a ground of action if it is formal by the *lex loci contractus*; whereas a gratuitous disposition, especially if *mortis causa*, ought not to be effectual unless it is formal by the *lex rei sitae*. This view is also supported by the opinion of Lord Kames (*y*), who challenges the decision of Lord Dalkeith *v.* Book, on which Mr Erskine founds.[4]

§ 1031. Another application of the rule as to foreign deeds relating to heritage is, that a will formal by the *lex domicilii testatoris* is ineffectual as a bequest of heritable subjects in Scotland. This follows from the rule that Scotch heritage can only be transmitted by deeds in the form of conveyances *inter vivos;* for it would be absurd to give to a foreign testament a greater effect than that which could follow upon a will bearing the formalities required by Scotch law (*z*). Accordingly, a foreign will is ineffectual to carry subjects heritable in their own nature (*a*), or debts heritably secured (*b*), even where the security is taken to another person in

(*r*) Ersk., 3, 2, 40—Kames' Equity, p. 548—Govan *v.* Boyd, 1790, M., 4476; Bell's Octavo Ca., 223; 1 Ross Ca., 112, S. C.—Cuningham *v.* L. Sempil, 1706, M., 4462; 1 Ross Ca., 110, S. C.—Weir *v.* Laing, 1821, 1 S., 192. (*s*) Case of L. Mary Cochrane *v.* Col. Erskine (not rep.), mentioned in 1 Ross Ca., 116. As the note of this case, however, is taken from a written pleading, it cannot be relied upon.

(*t*) E. Dalkeith *v.* Book, 1729, M., 4464. (*u*) Ersk., 3, 2, 40—See also Tait Ev., 126. (*x*) 1 Ross Ca., 118. (*y*) Kames' Equity, 551.

(*z*) Ersk., 3, 2, 41. (*a*) Ersk., *supra*—Burgess *v.* Staintin, 1764, M., 4484—Crawfurd's Children *v.* Crawfurd, 1774, M., 4486—Henderson *v.* Selkrig, 1795, M., 4489—Robertson's Crs. *v.* Mason's Disponees, 1795, M., 4491. (*b*) Henderson's Children *v.* Murray, 1623, M., 4481—Melvil *v.* Drummond, 1634, M., 4483.

[4] It is thought to be the law of Scotland that a writing purporting to transfer Scotch heritage is of no effect unless framed, "both in point of style, and in point of formality, according to the peculiar law and practice of Scotland." See Leith *v.* Leith, 1848, 10 D., 1137—Purves' Trustees *v.* Purves' Executors, 1861, 23 D., 812, 826.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] Dundas v. Dundas, 1830, 7 S., 241; affd., 4 W. S., 400—Trotter v. Trotter, 1829, 5 S., [illegible]; affd., 3 W. S., 407—Murray v. Smith, 1828, 6 S., [illegible]—Campbell v. M[illegible], 1[illegible]—Louden v. Louden, 1811, Hume D., 23—Gainer v. Cunningham, 1756, 1 Bligh, 27. So in Bennet v. Bennet's Tr., 1829, 7 S., 817, a widow was not allowed to take both her share of her husband's estate in the Isle of Man, on the footing of its being intestate, and the provision in her favour under a Scotch trust-deed, which the trustee had intended should include that property, but which had failed to do so in consequence of informalities by Manx law. Of course the rule stated in the text only holds where the foreign deed is insufficient to carry heritage in consequence of informalities, and does not apply where the granter's intention to bequeath that estate is doubtful. See Robertson v. Robertson, 16th February 1816, F. C.—Wightman v. De Lisle, 1862, M., 4479, as explained in Hume D., 24—Per Lord Fullerton in Robertson v. Cunningham's Tr., 1844, 7 D., 236.

f Forbes v. Cockburn, 1827, 5 S., 897—Brach v. Johnstone, 1827, 6 S., 113; affd., 5 W. S., 61—Kerr v. Kerr's Tr., 1829, 7 S., 454, and 8 S., 694; affd., 5 W. S., 718—Cameron v. Mackie, 1831, 9 S., 601; affd., 7 W. S., 106—Willock v. Auchterlony, 1772, M., 5539, 1 Ross Ca., 401. *g* B. Norton's Tr. v. Ly. Menzies, 1851, 13 D., 1017. With this case compare Bowie v. Bowie, 1811, Hume D., 765.

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[5] Purves' Trustees v. Purves' Executors, *supra*. Campbell's Trustees v. Campbell, 1862, 24 D., 1321. But see *infra*, § 1042, note [14].

§ 1034. Moreover, a conveyance of heritage by a formal Scotch deed, reserving power to alter, may be revoked or limited by a will or other deed formal by the *lex domicilii* of the granter, but deficient in the solemnities prescribed by Scotch law (*h*).[6]

§ 1035. International questions regarding deeds usually involve another principle, namely, that courts of law are in general bound to apply their own rules of evidence in investigations which proceed before them, although the cause of action arose in a country where different rules of evidence are observed. This principle is fully elaborated in two judgments of Lord Brougham, and is established by other authorities (*i*). Its application has already been seen in the rule that the courts of a country where a certain prescription, or limitation of the mode of proof exists, are bound to apply that prescription, although it is not recognised in the *lex loci contractus* (*j*).[7] In like manner, courts in Scotland would not, be-

(*h*) Simpson *v.* Barclay, 1752, Elch., "Testament," No. 2; 5 B. Sup., 794; 1 Ross Ca., 1; S. C.—Dundas *v.* Dundas, 1783, M., 15,585; 1 Ross Ca., 673, 724, S. C. (On this case see Sandford on Entails, 229)—Whytelaw *v.* Lang, 16th November 1810, 2 Bell's Illust., 417; 2 Sh. Ap. Ca., 13 (note); 1 Ross Ca., 674, S. C.—Leith *v.* Leith, 1848, 10 D., 1137. The rubric of Cameron *v.* Mackie, 7 W. S., 106, stating the opposite doctrine, is erroneous, as the point did not occur in the case. See also Henderson *v.* Wilson, 1797, M., 15,444; reversed, M., Appx., "Tailzie," No. 3; noticed in Sandford on Entails, 230. The cases on this subject are ably analysed in 1 Ross Ca., 673, 723.

(*i*) In Yates *v.* Thomson, 1835, 3 Cl. and Finn., 587, Lord Brougham observed, "Those principles which regulate the admission of evidence are the rules by which the courts of every country guide themselves in all their inquiries. The truth with respect to men's actions, which form the subject-matter of their inquiry, is to be ascertained according to a certain definite course of proceeding; and certain rules have established that, in pursuing this investigation, some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject-matter of investigation; nor can it make any difference whether the facts concerning which the discussion arises happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted, as that another law of evidence should be admitted in such cases. Who would argue that, in a question like the present, the Court of Session should try the point of fact by a jury, according to the English procedure, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case were the question raised here? The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now, the law of evidence is among the chief of these rules." See also, per L. Brougham in Don *v.* Lippman, 1837, 2 Sh. and M'L., 726—*Per eund.* in Bain *v.* Whitehaven, &c. Railway Co.. 1850, 7 Bell App. Ca., 92—Story's Confl., § 634—Taylor on Ev., 46, 47. (*j*) *Supra*, § 526, *et seq.*

[6] Purves' Trustees *v.* Purves' Executors, *supra.* But see *infra*, note [10].

[7] The holder of a bill drawn and accepted in England, and made payable in Eng-

fore the act 16 Vict., c. 20, have been obliged to admit the parties as witnesses, in consequence of the cause of action having arisen in England, where such evidence was admissible. Nor is it a good reason for excluding the pursuer's oath in supplement in a Scotch court, that the *lex loci contractus* does not admit that mode of investigation (*k*). And again, one witness would not be full proof in an action in Scotland, in consequence of the contract or other matter involved having arisen in England, where the law is satisfied with that amount of evidence.

§ 1036. How then does this principle accord with the rule already noticed, that the validity of deeds concerning moveables depends on the *lex loci contractus?* For example, a Scotch deed formal by the act 1681, is admitted in Scotland without parole proof of its genuineness;—Will it be received in the same way in a country where the witnesses to deeds, if alive, must be adduced to prove their attestations? Or again, will a deed executed in England according to the formalities required there, be received as probative in this country; or must the attesting witnesses be examined in support of it? Farther, if a deed is executed before witnesses who are disqualified for that office by the *lex loci contractus*, but admissible in the *lex fori*—or *vice versa*;—will the deed be effectual? A still more difficult question arises: Suppose witnesses to be admissible in the *lex loci contractus* to establish an obligation which, by the *lex fori*, can only be proved by writ or oath of party, —will the court in which action is raised to enforce the obligation follow its own rules, and thereby render that right unavailing which was validly constituted by the law on which the parties relied at its date; or will that court observe the rules of evidence in another country in ascertaining a fact for which their own practice prescribes a different mode of investigation? And in the converse case, of an obligation which, by the *lex loci contractus* requires to be reduced to writing, being sued upon in a country where parole of such obligations is competent;—will witnesses be admitted to prove it in the courts of the latter country?

(*k*) Fraser *v.* Lookup, 1748, M., 4590.

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land, charged the acceptor on it in Scotland. The acceptor pleaded that it had been fraudulently indorsed; and that, seeing it was an English bill, the charger was bound, according to English law, to prove that he got it *in bona fide*, and for an onerous consideration. But it was held that the questions relating to the proof of the value of the bill fell to be determined by the *lex fori;* Mackenzie *v.* Hall, 1854, 17 D., 164.

It is impossible to solve all the difficulties with which these questions are surrounded; and to analyse and balance the conflicting opinions on them would require much more space than can be devoted to the subject in this volume. The following rules, however, may be stated as most in accordance with principle and authority.

§ 1037. A deed executed in Scotland bearing the solemnities required by Scotch law, while it will be admitted in a country where different solemnities are observed, and where the witnesses to deeds executed in that country must be adduced to prove their attestations, will not receive effect there without the instrumentary witnesses being examined, if they are alive (*l*).

§ 1038. A foreign deed duly authenticated by the *lex loci contractus*, but not admissible in that country without the instrumentary witnesses proving its genuineness will not be received in Scotland as probative; for (besides the consideration noticed in next section) the solemnities prescribed by the law where it was executed are not designed as full proof of authenticity; and therefore, to admit the deed without corroborative evidence, would be to receive as complete proof a writing which is not complete proof by the law with reference to which it was prepared.[8]

§ 1039. Even where by the foreign *lex loci contractus* a deed is probative, it is thought that the Courts of this country ought not to admit it without some evidence of its genuineness; because the solemnities prescribed by the foreign code may be inadequate, or their value may arise from tests which have a local character. For example, a deed appearing to bear the signature of a notary may usually be received with safety in the *locus contractus*, where the existence and character of such a functionary can easily be ascertained, and where the signature and seal to the deed can be compared with those appended to genuine documents; whereas such means of testing its authenticity are not likely to be within the reach of a party, against whom the deed or instrument is tendered in the Court of another country. Farther, the rule by which a deed attested according to the act 1681 is probative, is an exception to the more general rule, that a document must be proved to be genuine before it can be received as such; and the exceptional rule

(*l*) Per Lord Brougham in Yates *v.* Thomson, *supra*—Taylor, 47.

[8] Earl of Hopetoun *v.* Scots Mines Co., 1856, 18 D., 739. See opinion of Lord Curriehill, 747.

arises from the legislature of this country being satisfied with the safeguards which it has prescribed, as *prima facie* proof of genuineness. But this cannot be applied by analogy to the formalities enacted by the legislature of a foreign state.[9]

§ 1040. Yet, where there was no reason for doubting the genuineness of a foreign deed, and where great inconvenience and delay would have been occasioned by requiring it to be proved, the Court have dispensed with the witnesses' attendance, and received the deed as *prima facie* proof (*m*).

§ 1041. It is thought that a deed attested by a witness who is competent by the *lex loci contractus*, but incompetent by the *lex fori*, ought to be sustained, both because it was validly executed according to the law upon which the parties were entitled to rely, and because the witnesses whom the parties to a deed select to attest it should not, except in extreme cases, be held to be incompetent (*n*).

§ 1042. Judge Story lays down, that a deed executed in the presence of witnesses, one or both of whom are incompetent by the *lex loci contractus*, is invalid, although the same ground of incompetency does not exist in the *lex fori* (*o*). Nor is it easy to draw a distinction between such a deed and one which is attested by fewer witnesses than the *lex loci contractus* requires; the invalidity of which seems to be clear (*p*). Yet this view almost comes into conflict with the principle, that the Courts of one country are not bound to observe the rules of evidence of another; for the qualifications of instrumentary witnesses rather form part of this branch of law, than of that which relates to the constitution of obligations. It were also unfortunate that such an objection should be fatal on account of the technical regulations of a foreign state, in opposition to the real justice and *bona fides* of the transaction.[10]

(*m*) Thus in Scott *v.* Miller, 1830, 5 Mur., 239, a power of attorney executed in America, and attested by a notary there, was received as *prima facie* proof, on account of the hardship of bringing witnesses from America to prove it. In an old case, Chatto *v.* Ord, 1702, M., 4456, an English bond was received in Scotland, without calling the instrumentary witnesses, which the Court of that day considered impracticable on account of the distance. The want of means for compelling the attendance of foreign witnesses may also be taken into view in such cases. (*n*) See *supra*, §§ 690, 691.

(*o*) Story, § 630. (*p*) Yates *v.* Thomson, 1835, 3 Cl. and Finn., 567.

[9] The passage in the text seems opposed to the settled rule, that a written contract executed according to the forms required by the *lex loci contractus*, will be received as well executed in the courts of other countries. See *infra*, note [10].

[10] The law of Scotland has been somewhat elucidated and matured on the questions treated of in this and the previous sections, by recent decisions. It seems quite clear,

§ 1043. The next question is, whether a contract or right which by the *lex loci contractus* cannot be proved by parole, will be sus-

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as a general rule, that the validity of a contract or deed regarding moveables depends, so far as regards the mode of execution, on the *lex loci executionis*. If the deed be validly executed according to that law, it will be received as a valid deed in the Courts of Scotland (if it be not *contra bonos mores*); and in like manner, a contract or other deed *inter vivos* regarding moveables, duly executed in Scotland, will receive effect in foreign courts, because laws as to the formalities and authentication of writings do not extend *extra territorium*. In a recent case, the question was raised whether two decrees-arbitral, pronounced in England in a Scotch submission, could receive effect in Scotland. It was held that they were not authenticated according to the Scotch statutes. Lord Benholme thought that although the formal validity of *contracts* was to be judged of according to the *lex loci executionis*, yet that decrees-arbitral were in a different position, being deeds executed under powers or faculties, and depending for their validity solely on the power conferred expressly or by implication. But the other judges (the case being sent to the whole Court) held that the Court would recognise the decrees if they were valid according to the law of England. Some of the judges thought that they might be sustained whether held authentic in England or not. English counsel, in answer to a Case sent under order of the Court, returned an opinion that, by the law of England, no particular formalities were required to authenticate an award, but that an award signed by the arbiter would be received, on proof of the arbiter's signature. The Court then pronounced an interlocutor finding that the decrees might be recognised, if the Court were satisfied that they were authentic, and that they correctly expressed the final decision of the arbiter; Earl of Hopetoun *v.* Scots Mines Co., 1856, 18 D., 739—See Fenton *v.* Livingstone, H. of L., 1859, 3 Macq., 497, 31 Scot. Jur., 578. The Lord Justice Clerk (Inglis) sums up the law on this point thus:—"All instruments (without distinction, except in the case of conveyance of land) executed abroad according to the solemnities of the place of execution, must receive effect in Scotland exactly in the same way as if they were executed within Scotland according to the solemnities of the act 1681;" Purves' Trustees *v.* Purves' Executors, 28 D., 831.

The law as to the validity of wills, in respect of formality of execution, has been to a large extent defined by the recent statute 24 and 25 Vict., c. 114. That statute provides "that every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin." The second section provides that wills made within the United Kingdom by British subjects shall, as regards personal estate, be held to be well executed, if executed according to the forms required for the time in the part of the United Kingdom where the will is made. The third section provides that no will shall be held to be revoked or to become invalid, nor shall the construction of it be altered, because of any subsequent change of the domicile of the testator. The act provides (§ 4) that its provisions shall not invalidate any will which, independently of the act, would be valid; and (§ 5) it extends only to wills and other testamentary instruments made by persons who die after the passing of the act, viz., 6th August 1861. It will be observed that this act applies only to wills

tained on that kind of evidence, if by the *lex fori* it can be so proved. On this point a distinction must be taken between cases

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made by British subjects. As to the persons who are British subjects, see Sheddan *v.* Patrick, 1854, 1 Macq., 535.

Before this act was passed, the doctrine that a will was good if executed in the form required by the law of the testator's domicile of origin, or in the form required by the law of the place of execution, was definitively rejected in the English Courts, and the general rule was that no will was recognised in England, or admitted to probate, except a will in the form prescribed by the law of the testator's domicile at death; Croker *v.* Marquis of Hertford, 1843, 3 Curt., 468—Stanley *v.* Bernes, 1830, 3 Haggard, 373—Bremer *v.* Freeman, 1857, 10 More's Privy Council Cas., 306. To this rule several jurists recognised an exception in the case where a testator had made a will in the forms required by the law of his domicile, and, before his death, had acquired a domicile in a country requiring different forms of execution. Whether, in that case, his will would be valid or not, appears, prior to the act 24 and 25 Vict., c. 114, to have been in England an open question. Perhaps the preponderance of authority was in favour of the validity of the will, but in a recent case in America, it was held that a will was, in such circumstances, invalid; Nat *v.* Coon, 10 Missouri Rep., 543, in conformity with the opinion of Story, Conflict of Laws, § 473—See Jarman on Wills, 3d ed., vol. i, p. 2, *et seq.*—Westlake's International Law, § 323—Burge's Com., vol. iv, p. 576—Phillimore's International Law, vol. iv, p. 626, 27, 28. The general rule of the English law was applied in a recent case, in which an Englishwoman who had been married in England and divorced in Scotland, and who afterwards resided in France, executed a will, valid according to the law of France, but not in conformity with the English statute of wills. Had she been domiciled in France, the will would have been held good. But it was held, in the English Courts, that her divorce from her husband was invalid; that her domicile, therefore, was that of her husband, which was England; and that, therefore, her will, being invalid according to the law of the domicile, could not be admitted to probate, or receive any effect; Robins *v.* Dolphin, 1858, 27 L. J. Prob., 24. In contrast with this case was another recent case, in which an Englishwoman who had long resided in France, made, while she was in England, a will in conformity with the English statute of wills. The will was sustained on two grounds—*First*, because it was held that the domicile of the testatrix was England; and, *secondly*, because, even if her domicile had been France, the will would have been good; because the law of France, like the law of Scotland, recognises all wills made in the form required by the law of the place of execution; Crookenden *v.* Fuller, 1859, 8 Weekly Reports, 49.

It is thought that the law of Scotland never required that a testament bequeathing moveables should be executed according to the forms required by the testator's domicile, but has recognised all testaments, executed either according to the *lex loci executionis*, or the *lex loci domicilii*. Before the act 24 and 25 Vict., c. 114, was passed, the law of Scotland on this subject was very elaborately discussed in Cases which were sent to the whole Court in Purves' Trustees *v.* Purves' Executors. There the testator, who was a domiciled Scotchman, died in Scotland; and a question arose as to the validity of his last will, which he had executed in Sumatra. This will was not authenticated according to the solemnities of the act 1681, and the question was, Whether it was valid if executed according to the law of Sumatra? It was contended, on the one hand, that in determining as to the formal validity of a testament, the law of Scotland recognised not the *lex loci actus*, but the *lex rei sitae;* at one period it had been held that the legal

where writing is necessary *ex solennitate*, and those in which it is only a mode of proof, competent along with oath on reference and

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situs of moveable property, situated in fact in Scotland, was Scotland, wherever the owner of it was, or was domiciled; and that therefore a bequest of moveables situated in Scotland required to be made with the formalities of the act 1681, as the *lex rei sitae;* but it was afterwards established that, in questions of succession, moveable property had in law no *situs* except that of the domicile of the owner of it; and hence the rule of law recognising the *lex rei sitae* became, as regarded testate personal succession, a rule recognising the law of the domicile of the testator at death; and, it was argued, that the Courts of the domicile, being Scotland, must apply their own rules of evidence, namely, those provided by the act of 1681. On the other hand, it was contended that testaments disposing of moveable estate were on exactly the same footing as contracts, and might, as in the case of mutual wills, take the form of contracts, and were, like contracts, valid if executed according to the law of the place of execution. The majority of the whole Court held that the will was to be regarded as a valid expression of the testamentary intentions of the deceased, if formally executed according to the law of Sumatra,—that while Scottish heritage could not be bequeathed at all, and could be conveyed only by a deed in the form required by the *lex rei sitae*, it was the settled law of Scotland that the Scotch statutes as to authentication of deeds are not imperative as to wills "executed in a foreign country, but that such writings are receivable here as valid or authentic expressions of testamentary will, if executed according to the formalities which would make them valid as wills or testaments in the country of execution; and that, in this respect, there is no distinction between such writings and any writings of the nature of contracts or obligations executed abroad, unless it be that, from the peculiar favour shown to wills, they may be treated with more indulgence than a writing *inter vivos*." . . . . "In none of the cases is the domicile of the party, whether at the date of execution or at the date of death, regarded as affecting the authentication of the deed." . . . . "In the case of Leith, the testator, though he died in London, was domiciled in Scotland. But this circumstance, though most material as affecting the rights of parties interested in his succession, was not considered, and has never been considered, by the law of Scotland as affecting the validity of the deed as a mere instrument, if executed according to the *lex loci actus*." Their Lordships expressed their concurrence with those continental jurists who held that a testator making his will in a foreign country had his option to follow either the formalities prevailing in the place of his domicile (that is to say, his domicile at the time of making the deed), or those of the place of execution. The Lord Justice-Clerk (Inglis), in expressing his concurrence with the consulted judges, stated the law as follows:—"The estate, or a considerable portion of the estate, both heritable and moveable, of the testator, being locally within Scotland, this Court is *forum competens* to ascertain and determine any question which may arise as to his succession. But the *forum competens* may, in many cases, require to resort to foreign law for the purpose of determining such questions. For the law of the domicile of the deceased, at the date of his death, must determine not only what is the true meaning and construction and effect of any will or deed of settlement he may have left, disposing of his moveable estate, but also, as regards his moveable estate, whether he died testate or intestate; and if he died testate, the law of the domicile must further determine what paper or papers constitute the will of the deceased." . . . . "In the present case, the law of the *forum* and the law of the domicile are the same; and therefore we are not driven to resort to any foreign law to ascertain what constitutes the

admissions on record. In cases of the former class the interposition of writing is a condition suspensive of the obligation; and, till it has

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will of the deceased. But it is of the utmost importance to keep in view what is the function of the *forum* of distribution, acting as a mere medium of granting administration or dividing the estate, and the function of the law of domicile as fixing what is the will. That the law of the domicile can alone settle what is the will, is a principle of international law of extensive, if not universal, acceptation. And the *forum* of distribution bends to that law, and receives its instruction with unquestioning faith in deference to this international principle. But the function of the law of the domicile is quite different. It determines what is to be received as the will of the deceased, not on any principles of international law or views of general jurisprudence, but according to the rules of its own municipal system." His Lordship went on to say, that it being ascertained that the testator was domiciled in Scotland, the question, What were his testamentary papers? was not a question of international law, but a question in the municipal law of Scotland; and the settled law of Scotland—that is, of the domicile—was, that "all instruments (without distinction, except in the case of conveyance of land) executed abroad, according to the solemnities of the place of execution, must receive effect in Scotland exactly in the same way as if they were executed within Scotland according to the solemnities of the act 1681." It seems doubtful, at first sight, how far the opinion of the Lord Justice-Clerk, and that of the majority of the consulted judges, proceed on the same principles. The latter held that the Courts of Scotland recognise any will authenticated according to the law of the place of execution, whatever was the domicile of the testator; and that the domicile of the testator, at the date of his death, cannot be regarded as affecting the authentication of his will. The Lord Justice-Clerk held the question to be a question of the law of the domicile, and that the law of the domicile, in this particular case, recognised all wills executed according to the forms required by the law of the place of execution. The result of both views was, of course, in the circumstances of that case, the same, namely, to support the will, if valid according to the *lex loci actus*. But supposing that the testator in the case of Purves had been domiciled in England at the date of his death, it is thought that the Scottish Court, as the *forum competens*, would not have administered the law of the domicile only. If reference were made, in the case supposed, to the law of the domicile—that is, to the law of England—to ascertain whether the will was valid or not, the answer would, it is apprehended, have been adverse to the validity of the will according to the law of the domicile, if it were not framed in conformity with the English statute of wills; unless, indeed, the English Courts acted on the view of the Lord Justice-Clerk, viz., that the municipal law of England is, that all instruments executed abroad according to the solemnities of the place of execution must receive effect in England in the same way as if they were executed within England according to the English statute of wills. But the case of Bremer *v.* Freeman, *supra*, shows that no such view is recognised in the English Courts; and, therefore, if the Scottish Courts, in the supposed case, made reference to the law of the English domicile, the answer would be that the will was invalidly executed according to the law of the domicile. Yet, it is thought, that the Scotch Court, as the tribunal of distribution, would of necessity recognise the will, though authenticated neither according to the statute 1681, nor according to the forms required by the law of domicile, if authenticated according to the forms required by the *lex loci actus*. Perhaps the law laid down in the case of Purves may be stated thus:—That in all questions as to the capacity of a testator to test, or the construction of his will, or its legal effect, reference must be made to the law of his domicile at death; that reference must also be made to

been adhibited, the contract is inchoate and deficient in the essential element of final consent; as the party might admit on record that he had verbally agreed to be bound, and yet might escape by pleading his right to resile, provided matters were entire. Accordingly, in such cases parole of the verbal agreement seems to be inadmissible, notwithstanding the rules recognised in the *lex fori* (*r*). For example, this would be the rule in a verbal contract of service for more than a year (*s*), a verbal assignation of an incorporeal moveable (*t*), or of a patent or copyright (*u*), and in a verbal contract which the parties agreed should be committed to writing (*x*); such contracts being entered into in Scotland, and sought to be enforced in another country. So a verbal sale of goods in a country where writing is essential to the sale of articles of their value, would

(*r*) The law is so laid down in 2 Boullenois, 458, 9—Story, § 262—3 Burge, 760.
(*s*) *Supra*, § 564. (*t*) *Supra*, § 557. (*u*) *Supra*, § 558.
(*x*) *Supra*, § 603.

that law to ascertain whether he has left any papers, and if so, what papers, which are of a testamentary character in point of expression, construction, and intention; but that as to authentication and form, the papers thus ascertained to be testamentary in their nature, will be sustained as duly executed, if executed according to the law of the place of execution, whatever the law of the domicile of the testator may declare on that subject. It is of importance, however, to observe, that if a British subject, who dies after 6th August 1861, makes a will, and afterwards changes his domicile, and has a domicile at the date of his death different from his domicile when he made his will, questions as to the construction of that will must now be determined according to the law of the testator's domicile when he made his will, and not according to the law of his domicile at death; because the third section of the act 24 and 25 Vict., c. 114, provides that the construction of a will, once made, shall not be held as altered by change of domicile. It would seem to follow, also, that reference must be made to the domicile of a testator at the time when he executed any writing, to ascertain whether that writing, according to its true construction, was or was not testamentary. If, however, the construction of a will does not depend on any peculiarity of the foreign law, the Court will construe it for themselves; Sinclair and Others (Thomson's Trustees) *v.* Alexander, 1851, 14 D., 217. While all conveyances of Scotch heritage not executed according to the solemnities required by the Scotch statutes, and all bequests of Scotch heritage, are null, a will or other deed executed abroad according to the forms of the place of execution, revoking the conveyance and purposes in a duly executed Scotch trust-deed conveying heritage *mortis causa*, will receive effect. But if a party execute in Scotland a trust-disposition and settlement conveying heritage to trustees, and directing them as to its disposal, and afterwards execute a will revoking all former wills, and bequeathing his heritage to other individuals, it has been held that in such a case the conveyance in the trust-deed to the trustees is not revoked, but that the revocation of all wills operates as a revocation of the directions in the trust-deed, and that the new bequests may receive effect as new directions to the trustees; Purves' Trustees *v.* Purves' Executors, 1861, 23 D., 812—Boe *v.* Anderson, 1862, 24 D., 732—Campbell's Trustees *v.* Campbell, 1862, 24 D., 1321—Phillimore's International Law, vol. iv, p. 627, *et seq.*

be invalid in another country where writing is not required in such transactions (*y*).

§ 1044. But where the exclusion of parole by the *lex loci contractus* does not arise from writing being an essential solemnity, and where, therefore, the absence of writing does not infer right to resile, the opposite rule to that stated in the preceding section will be applied; for the exclusion of parole by the *lex loci contractus* is merely a regulation as to the mode of proving the fact in issue, and is entirely independent of the constitution of the right or obligation. This principle is well illustrated in international questions of prescription, where it is settled that the court of the debtor's domicile ought not to give effect to such prescriptions prevailing in the *lex loci contractus* as merely limit the creditor's mode of proof by excluding parole of the contract (*z*). In the same way, although a loan of money exceeding £8 : 6 : 8, contracted in Scotland, can by the law of that country be proved only by the alleged debtor's writ or oath, yet if it is sued upon in England, the plaintiff may lead evidence of the defendant's verbal acknowledgment of the debt, and any other proof which is competent by English law (*a*).

§ 1045. The distinction noticed in the two preceding sections seems to apply *e converso* to those cases where the *lex loci contractus* admits, but the *lex fori* excludes, parole proof. Thus a person sued in Scotland to fulfil a contract which can be constituted verbally in a foreign country, cannot plead that the contract is ineffectual, because by Scotch law writing is essential to contracts of that nature, when entered into in Scotland. In such a case the contract, having been validly constituted by the final consent of the parties according to the *lex loci contractus*, is effectual everywhere, and cannot be voided by importing into it a rule suspensive of the constitution of similar contracts by the *lex fori*. That rule is limited to contracts which were entered into with reference to the law which prescribes it; and it should not have the retro-active effect of annulling a contract which the parties entered into (as they were entitled to do) without reference to its existence. Accordingly, if a party, when sued in a Scotch court to implement an obligation which is alleged to have been constituted verbally in a foreign country, admits the fact on record or in his oath on reference, he will be bound to implement the contract, provided by the *lex loci*

(*y*) Boullenois, *supra*—Story, *supra*—Burge, *supra*. (*z*) See on this, *supra*, § 526, *et seq*. (*a*) Per L. Brougham in Don *v.* Lippman, 1837, 2 Sh. and M'L., 728.

contractus writing is not required for its constitution; such admissions being in Scotland full proof of facts to the legal existence of which writing is not essential. In like manner the party's writ dated *ex intervallo*, admitting that the contract had been constituted as a verbal bargain, would be effectual; whereas, if Scotland had been the *locus* of the contract, a proper written constitution of it would have been required.

§ 1046. This view is supported by the opinions of eminent jurists (*b*); as well as by a decision in which Lord Mackenzie (Ordinary) expressly applied the principle, and the Court, in adhering to his Lordship's judgment on other grounds, did not dissent from his view of the law (*c*). Opposed to these authorities is an old case in which the Court refused to sustain probate obtained in England by the executors under a nuncupative will; because, although such a will was valid in England, writing was essential as a solemnity to the nomination of an executor in Scotland (*d*). This decision is thought to be erroneous (*e*).[11]

(*b*) 2 Boullenois, 459—Story Confl., § 262—3 Burge Com., 160.

(*c*) Dale *v.* Dumbarton Glass Co., 1829, 7 S., 869. Here a workman holding himself out as bound to an English company for a term of years, having in England agreed verbally with a Scotch company to exchange with a servant in their employment; in a petition before the Sheriff to have him ordained to fulfil his contract, parole of the communings between the parties, as well as written evidence, was adduced without objection; and the Sheriff held the contract to have been constituted as for the full term. Lord Mackenzie, in sustaining the judgment, added a finding, "That the agreement took place in England, by the law of which it appears that an agreement of service during more years than one may be completed by oral words, if followed by actual commencement of the service." There was no proof of English law; and, accordingly, Lords Glenlee and Pitmilly (with whom the other judges concurred) observed, that they knew nothing of that law as applying to the case; but the latter judge added, "We have the evidence of what this man held out to be the law of England in this particular case; and that is sufficient to justify the finding of the Lord Ordinary on the point."

(*d*) Shaw *v.* Lewis, 1665, M., 4494. The report bears, that the Lords "found that the question was not here of the manner of probation of a nomination, in which case they would have followed the law of the place; but it was upon the constitution of the essentials of a right, viz., a nomination, which, albeit it was certainly known to have been by word; yea, if it were offered to be proven by the nearest of kin that they were witnesses thereto; yet the solemnity of writ not being interposed, the nomination is itself defective and null *in substantialibus*." (*e*) This decision is opposed to many cases in which the law of the deceased's domicile has been held to regulate the question who is his executor (see *supra*, § 633), and the views which the Court announced as to being guided by that law in opposition to the *lex fori* in a matter of evidence are undoubtedly erroneous; see §§ 1035, 1048.

[11] It is thought that the law of the domicile must determine whether a man dies testate or intestate; Purves *v.* Purves, 1861, 23 D., 880; per Lord Justice-Clerk.

§ 1047. But, while the *lex loci contractus* regulates the constitution of the obligation in the cases referred to in the two preceding sections, it is thought that that law does not determine the mode of proof. The question which the court where the action is raised has to decide is, whether a verbal contract in certain terms was constituted; and that they must do by their own rules of evidence. The Scotch lawyer is familiar with cases where obligations may be constituted and discharged verbally, and yet where the fact of constitution or discharge may be proved by the party's admissions on record, or by his writ or oath, but not by parole; as, for example, in obligations for repayment of borrowed money (*f*), in gratuitous promises (*g*), promises of marriage *subsequente copula* (*h*), in the discharge and renunciation of written obligations (*i*), and many other cases. Applying the same rule to foreign obligations for which parole is admissible in the *locus contractus*, but not in Scotland, it is thought that they may be proved in a Scotch court by the debtor's admission on record, or by his writ or oath, but not by parole.

§ 1048. This mode of dealing with such cases seems to be the only way in which the *lex loci contractus* and the *lex fori* can be confined to their respective spheres of the constitution and the proof of the contract. It is in complete accordance with the principle now firmly established that such Scotch prescriptions as limit the proof of the constitution and subsistence of certain obligations to the defender's writ or oath, apply to foreign contracts, although by the *lex loci contractus* these may be proved by parole (*k*). Lord Brougham's opinions in the leading case on that subject (*l*), and in a kindred case of not less authority (*m*), support the same principle, and must now be held to have overruled some previous decisions in which the opposite view had been taken (*n*).

§ 1049. As to what country forms the *locus contractus* the rule is, that it is the place where the contract received its essential ele-

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(*f*) *Supra*, §§ 592, 593. (*g*) *Supra*, § 595. (*h*) *Supra*, § 541. (*i*) *Supra*, §§ 606, 624. (*k*) *Supra*, § 526, *et seq.* (*l*) Don *v.* Lippman, 1837, 2 Sh. and M'L., 682, *supra*, ib. (*m*) Yates *v.* Thomson, 1835, 3 Cl. and Finn., 544. (*n*) In Glyn *v.* Johnston, 1830, 8 S., 889, parole of non-onerosity of a bill was admitted, because the *locus contractus* was England, where such proof was admissible. In Galbraith *v.* Cuningham, 1626, M., 4430, and L. Balbirnie *v.* L. Urtill, 1633, M., 4431, parole was admitted in Scotland to prove payment of certain bonds, on the ground that the payment was alleged to have been made in a country where that mode of proof was admissible. These cases are refuted by Lord Brougham in Don *v.* Lippman, *supra*. Still more erroneous were the views of the Court in the case of Shaw *v.* Lewis, *supra*, § 1046.

ment of consent. Accordingly, in a unilateral obligation it is the country in which the debtor resided when he granted the deed (*o*). So in a contract standing on offer and acceptance, it is the country in which the acceptor resided (*p*); and it is the country of the acceptor's domicile in questions between the drawer and acceptor of a bill of exchange (*r*).[12] An indorsation by a foreign drawer or payee does not follow the *locus* of the bill; but, in an action of recourse against him, it is a foreign contract (*s*).

Obligations contracted in Scotland by the Scotch agent of a foreign company, who has power to bind his principals, are Scotch contracts as much as if the real obligants had been domiciled in this country (*t*). But where an agent is merely authorised to receive proposals for contracts and to transmit them to his principals —the contract being constituted by his delivering to the other party a deed executed by the principals in the foreign country—the latter, and not the country of the agent's residence, is the *locus contractus* (*u*).

§ 1050. In the foregoing sections it has been assumed that the *locus contractus* is also the country where the obligation has to be performed. Where it is not, the contract will be sustained if it is valid according to the *lex loci solutionis*, the parties being presumed to have contracted with reference to that law (*x*). There seems not to be any decision, however, in which a contract valid by the

(*o*) Robertson *v.* Burdekin, 1843, 6 D., 17. (*p*) 3 Burge Com., 753.

(*r*) Reynolds *v.* Syme, 1774, M., 1598—M'Alpines *v.* Parsons, 1792, M., 1617—Strathern *v.* Masterman & Co., 1850, 12 D., 1087—3 Burge, 755.

(*s*) Story on Bills, §§ 157, 176—Don *v.* Lippman, 1837, 2 Sh. and M'L., 737; correcting Rickman *v.* M'Lachlan, 1827, 5 S., 700, and Royal Bank *v.* Smith & Co., 20th January 1813, F. C. (*t*) Mills *v.* Albion Ins. Co., 1828, 6 S., 409; affd., 3 W. S., 218. (*u*) Parken *v.* R. Exchange As. Co., 1846, 8 D., 365.

(*x*) Story Confl., § 280, *et seq.*—Story on Bills, §§ 129, 147—3 Burge, 771, 772—Robinson *v.* Bland, 1760, 2 Burr., 1077.

[12] It is thought that, as a general rule, the *locus contractus* of a bill, in questions between drawer and acceptor, is the place where the acceptor signed it, though not his domicile; Mackenzie *v.* Hall, 1854, 17 D., 164. There the acceptor was a domiciled Scotchman, but the *locus contractus* was England. In Don *v.* Lippman, *supra*, the acceptor of the bill was a domiciled Scotchman, but there was no doubt that the *locus contractus* was France, where he signed the bill; see Story's Confl. of Laws, 5th ed., § 314 —Phillimore's International Law, iv, p. 506. Of course this will not affect questions of remedy when a bill is sued on in a Scotch Court. Sergeant Byles lays it down, that the *locus solutionis* is to be deemed the *locus contractus;* Byles on Bills, 370. This seems, however, not consistent with Strathern *v.* Masterman, *supra*, where a bill accepted in Scotland, but payable in England, was held to be a Scotch bill.

lex loci contractus has fallen from being deficient in solemnities prescribed by the *lex loci solutionis.* The validity of such a contract may be maintained on the presumption that the parties meant to be regulated by the *lex loci contractus.* They were, perhaps, not aware of the formalities required in the *locus solutionis.*

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